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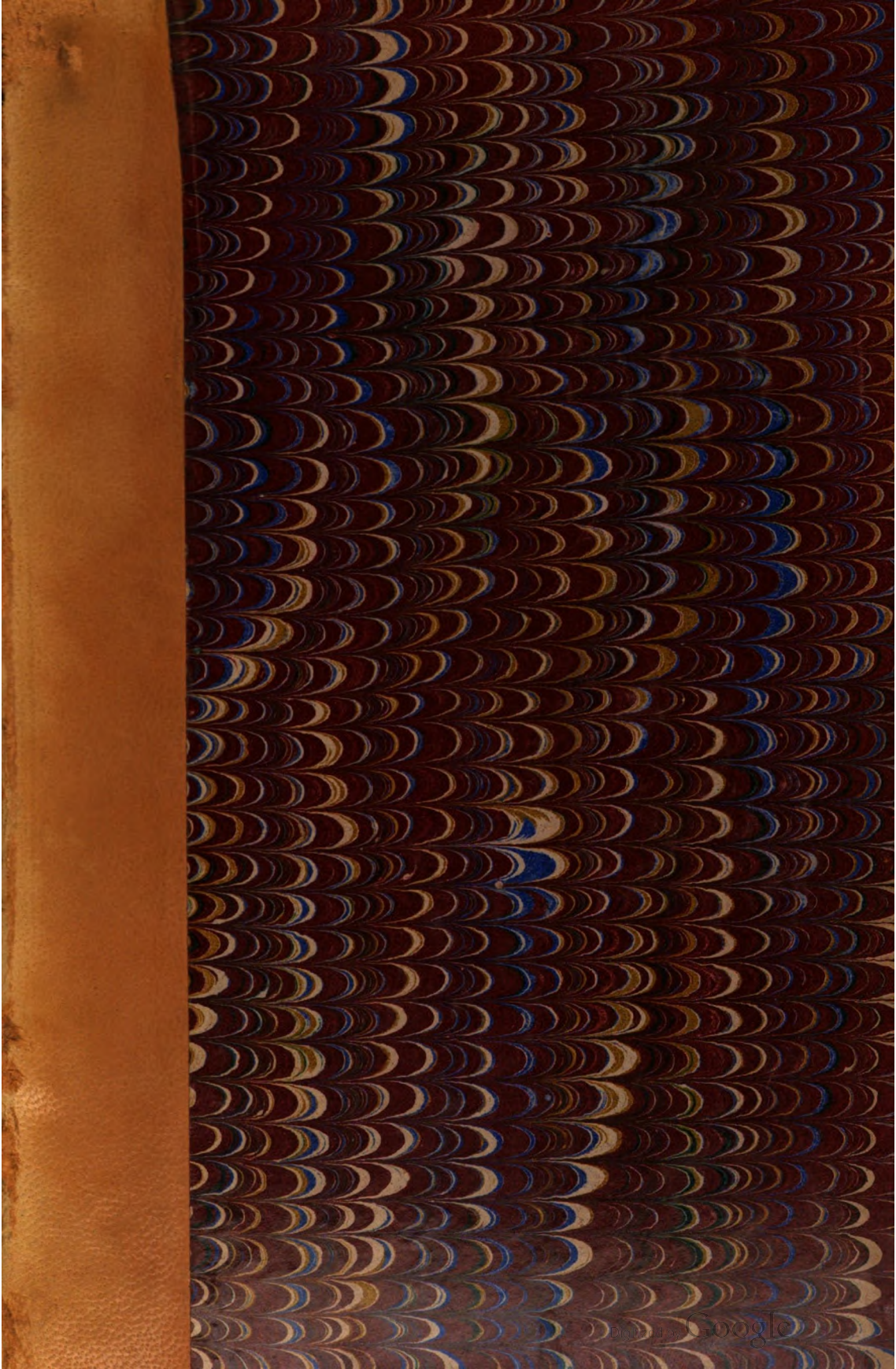
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THE  
**ONTARIO LAW REPORTS**

**CASES DETERMINED IN THE SUPREME COURT  
OF ONTARIO (APPELLATE AND HIGH  
COURT DIVISIONS).**

**1915.**

**REPORTED UNDER THE AUTHORITY OF THE  
LAW SOCIETY OF UPPER CANADA.**

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**JUDGES**  
**OF THE**  
**SUPREME COURT OF ONTARIO**  
**DURING THE PERIOD OF THESE REPORTS.**

**APPELLATE DIVISION.**

*First Divisional Court.*

**THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.**  
“ “ **JAMES THOMPSON GARROW, J.A.**  
“ “ **JOHN JAMES MACLAREN, J.A.**  
“ “ **JAMES MAGEE, J.A.**  
“ “ **FRANK EGERTON HOIGINS, J.A.**

*Second Divisional Court.*

**THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.**  
“ “ **WILLIAM RENWICK RIDDELL, J.**  
“ “ **FRANCIS ROBERT LATCHFORD, J.**  
“ “ **HUGH THOMAS KELLY, J.**  
“ “ **JAMES LEITCH, J.**

**HIGH COURT DIVISION.**

**THE HON. SIR JOHN ALEXANDER BOYD, C., K.C.M.G.**  
“ “ **SIR WILLIAM MULOCK, C.J.Ex., K.C.M.G.**  
“ “ **RICHARD MARTIN MEREDITH, C.J.C.P.**  
“ “ **BYRON MOFFATT BRITTON, J.**  
“ “ **ROGER CONGER CLUTE, J.**  
“ “ **ROBERT FRANKLIN SUTHERLAND, J.**  
“ “ **WILLIAM EDWARD MIDDLETON, J.**  
“ “ **HAUGHTON LENNOX, J.**



## ERRATA

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Page 22, 7th line from the top, for "*ante*" read "33 O.L.R."

Page 110, head-note, 4th line from the end, and p. 116, 2nd line from the bottom, for "90" read "80."

Page 128, 16th line from the top, for "131" read "38."

Page 257, 7th line from the top, insert, after "*taxes*," the words "of land subject to a restrictive covenant;" and in the 8th line substitute "it" for "the land."

Page 594, 17th line from the bottom, for "provided" read "provides;" and, 16th line from the bottom, for "continued" read "continues."

Page 595, 5th line from the top, insert "not" before "be."

Page 601, 17th line from the top, for "crosses" read "crossed."

Page 604, 6th line from the top, for "conception" read "construction."

# MEMORANDA

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## APPOINTMENT TO THE BENCH.

On the 30th October, 1915, Cornelius Arthur Masten, of the City of Toronto, in the Province of Ontario, Esquire, one of His Majesty's Counsel learned in the law for the said Province, was appointed a Judge of the Supreme Court of Ontario and a member of the High Court Division of the said Court and *ex officio* a member of the Appellate Division of the said Court, in the room and stead of The Honourable James Vernal Tetzels, resigned.

## CALL TO THE BAR.

In Trinity Term, 1915, the following gentlemen were called to the Bar:—

John Seaborn McLaughlin, Gerald Morphy Malone, Samuel Factor, William Roy Willard, Wilfrid Maynard Cox, Percy Edwin Frederick Smily, Hugh Anthony O'Donnell, Robert Alexander Patchell, John Harries Best, Willard F. Greig, Norman McKay Retallack, Maurice Edward Mulhern, James Oscar Buckley, Charles Alfred Payne, Thomas Eakin, Clarence Allen Paul, Thomas Joseph Galligan, Roy Beverley Whitehead, William Russell Campbell, Armand Chénier, Walter Gerald Lumsden, Alexander Laurence Shaver, Harold Nash Farmer, Robert Stewart Clark, Norman James Macdonald, Tom Brown, Joseph D. de Grandpré.

On the 21st October, 1915, the following gentlemen were called to the Bar:—

Edward Allan Hay, William Bruce Henderson, James George Guise-Bagley, Gerald McTeigue.

On the 18th November, 1915, the following gentlemen were called to the Bar:—

James Grant Allison Miller Schiller, Ewen James McEwen, Charles Black, Charles Hugh Higgins, Frank Baalim, John Joseph Hunt, John Idington, Charles Percy Plaxton, Joseph Patrick Walsh, Loyola Vincent Fitzpatrick, Homer Brock Neely, Redmond Code.



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# REPORTS OF CASES

DETERMINED IN THE

## SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

BALDWIN V. CHAPLIN.

1915

Jan. 8.  
April 26.

*Waters—Obstruction Placed on Waters of Navigable Lake by Lessee of Water Lots — Right of Riparian Owner to Access to Shore — Interference with—Prospective Use of Shore—Navigable Waters' Protection Act, R.S.C. 1906, ch. 115—Obstruction to Navigation—Common Law Nuisance—Statutory Authority—Order in Council—Non-compliance with Conditions—Special Interest under Fishery License—Interference with Public Right—Special Damage—Action—Appeal—Costs.*

The private right of access to land from navigable water is something given by virtue of and in respect of the riparian property, and is wholly distinct from the public right of navigation. Interference with the private right of access is actionable without proof of special damage; but, if the interference complained of is an interference with the right of navigation, which thereby affects the right of access, special damage must be proved by the riparian owner who complains of such interference. The damage proved must be a present one: a present damage may be proved by shewing that the necessary consequence of the obstruction is to produce injurious results in the future to the existing use; but that is something distinct from injury apprehended if a different use is contemplated. It is not therefore the prospective use that gives the right to claim damages or an injunction. There may be a right of action where the obstruction is distant, if it causes a present and practical deprivation of access. Whether the obstruction amounts to an interference with the riparian right of access is a question of fact to be determined by the circumstances of each particular case.

Review of the authorities.

And *held*, applying these considerations to the case in hand, that the plaintiffs, riparian owners on Lake Erie, and holders of a license to fish in front of their lot and adjoining lots, could not maintain that there was in fact interference with their riparian right of access by a pier erected upon the water in front of the plaintiffs' lot (at some distance from the shore) by the defendants, who had a lease from the Ontario Government of the water lot opposite the plaintiffs' lot, and the lots adjoining it; and that the suggested future user of the plaintiffs' lot as a landing-place, when a dock should be erected by them, could not support, under present conditions, a claim for damages or an injunction by reason of the pier.

*Held*, also, that, although the Navigable Waters' Protection Act, R.S.C. 1906, ch. 115, was intended to give the Governor-General in Council statutory authority to permit the erection of what would otherwise be a common law nuisance in navigable waters (*In re Provincial Fisheries* (1896), 26 S.C.R. 444), and although an order in council authorising

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the erection of the pier complained of by the plaintiffs had been issued under the authority of that Act, the defendants had not complied with the conditions of the order, and the pier was, when this action was begun, a common law nuisance and an obstruction to navigation; the plaintiffs had, therefore, having regard to their special interest under their fishery license, a right to sue without joining the Attorney-General for the Dominion as a party; but the right they sought to enforce was a public right—a right of navigation—not a property right, but a right of way—and there was no evidence that the pier in fact interfered with the plaintiffs' fishing operations.

Judgment of LATCHFORD, J., dismissing the action without costs, affirmed on appeal, also without costs.

**ACTION** for an injunction restraining the defendants from invading the plaintiffs' riparian rights in respect of land bordering on Lake Erie, for a mandatory order to compel the removal of structures placed by the defendants in the lake opposite the plaintiffs' land, and for a declaration of the plaintiffs' rights.

The action was tried by LATCHFORD, J., without a jury, at Chatham.

*W. M. Douglas, K.C., I. F. Hellmuth, K.C., and J. G. Kerr,* for the plaintiffs.

*O. L. Lewis, K.C., J. W. Bain, K.C., and Christopher C. Robinson,* for the defendants.

January 8. LATCHFORD, J.:—The plaintiff Frank P. Baldwin was, at the time of the commencement of this action, the owner in fee of the east quarter of lot No. 185, Talbot road survey, in the township of Romney, in the county of Elgin; and the plaintiff Nicholas Baldwin was the lessee from him of the same lands. After the action was begun, Frank P. Baldwin conveyed all his interest in the lands to his mother, Eliza Baldwin, who was thereupon added as a plaintiff.

Nicholas Baldwin resides on the property, and is engaged, under a license from the Crown, in extensive fishing operations in the waters of Lake Erie fronting upon the said lands and other lands in the vicinity. His license enables him to operate in front of lots 179 to 189 of the Talbot road survey. On lot 189, more than two miles to the west of lot 185, he has leased a landing-place, with store-houses for ice and fish. No similar accommodations at present exist upon his own property. He,

however, states that it is his intention to erect a proper landing stage and the buildings necessary for his fishery. All along the shores, pound-net fishermen like Nicholas Baldwin are operating under licenses from the Government of Ontario.

On the 1st August, 1911, the defendant James B. Chaplin, of St. Catharines, was granted, by the Government of Ontario, a lease at a nominal rental, for a period of ten years, and renewable, of "all the portion of land covered by the waters of Lake Erie in the township of Romney (*sic*), in front of lots 181 to 187 inclusive, in the said township of Romney, and extending 40 chains into the lake, containing about 608 acres, with the right to dig and explore for petroleum and natural gas and to remove the same."

The locality is known as a gas-producing district. Many gas-wells were in operation in the township of Romney when the lease was given. Mr. Chaplin's purpose in obtaining the concession was to bore for gas, or to dispose of his lease to persons engaged in producing natural gas or promoting companies with that object.

The lease is subject to conditions which with one exception have no bearing on the issues presented in this case.

The exception is, that the lessee or his assigns shall not in any way interfere with navigation or with the use of any docks or wharves existing or thereafter to be constructed in or upon the water covering the demised lands, or with the right of access to the water by the riparian proprietors.

When the township was surveyed, a reservation of one chain for a road was made near the shore. This road, known as the Old Talbot road, may have existed as a trail before the survey was made. Many years ago, the land between the old road and the lake, and the old road itself, disappeared, owing to erosive agencies, and the waters of Lake Erie now roll over part of the lands originally granted to the predecessors in title of the plaintiffs. A road, also called the Talbot road, was opened up in 1838, several hundred feet from the shore.

The plaintiffs' buildings are on a plateau about one hundred feet above the level of the lake. The shores are steep and the beach narrow. A road allowance extending along the easterly

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side of the Baldwin farm has been opened as far south as the present Talbot road. From the point of intersection to the lake, a ravine increasing in depth and width descends to the water in the line of the road allowance.

The soil and other materials falling into the lake form a bar approximately paralleling the shore and distant two hundred or three hundred feet from the water's edge. Ordinarily there is sufficient water—about six feet—over the bar to enable the fishermen to cross it without danger in their flat-bottomed boats. Tugs and large boats cannot come in near shore, but are obliged to anchor or lay-to some distance outside the bar, where they receive the fish collected from the pounds.

In January, 1913, Mr. Chaplin assigned all his interest in the lease to the Glenwood Natural Gas Company. Prior to the date of the assignment, in November, 1912, Mr. Chaplin or the Glenwood company, acting through the defendants Symmes and Tripplehorn, utilised the road allowance leading to the lake for bringing down timber and other materials to be used in erecting the structures necessary in sinking a gas-well opposite lot 185.

From the point where the end of the road allowance reaches the lake, they constructed a platform upon bents, extending in front of the plaintiffs' land in a broken line to a point on the bar, where piles were driven, a pier erected, and a gas-well bored. The platform and its supports were but temporary structures, which were removed when the well was completed. While they were in position, they obstructed any approach by boat to lot 185 from the east inside the bar—a course frequently taken by fishermen when heavy seas were running. It is not improbable that part of the platform was actually within the original boundaries of the plaintiffs' land. The plaintiffs are not, however, proceeding on the ground that they are the owners of the *situs* of the pier, and no evidence was submitted to establish what was originally the southerly boundary of the Baldwin property.

In this respect the present case differs from *Volcanic Oil and Gas Co. v. Chaplin* (1912), 27 O.L.R. 34, 484, and (1914) 31 O.L.R. 364, where the judgments below were reversed on a ques-

tion of fact. An appeal to the Supreme Court of Canada is now, I think, standing for judgment. In that case it was found by the learned and experienced trial Judge that the *situs* of the structures then in question was within the boundary of the lands granted to the predecessor in title of the plaintiff Carr. The case is unimpeached on the question of accretion, but it does not apply here.

In this case the plaintiffs seek an injunction restraining the defendants from invading their riparian rights, a mandatory order to compel the removal of the structures placed in the lake opposite lot 185, and a declaration of their rights.

Up to the time the pier was built, and for long afterward, the only rights any of the defendants had were such as the lease from the Government of Ontario conferred. The waters of Lake Erie are navigable, and the Navigable Waters' Protection Act (R.S.C. 1906, ch. 115, as amended by 9 & 10 Edw. VII. ch. 44) applies to them. Section 4 prohibits the building of any pier or other structure in or across any navigable water unless the site has been approved by the Governor in Council, or unless such pier or structure is built and maintained in accordance with plans approved by the Governor in Council. These provisions do not apply to small wharves nor to groynes or beach protection works or boat-houses which do not interfere with navigation.

All the structures other than the pier, with the well sunk in the centre of it, had been removed by the defendants prior to the trial of this action.

At a time not stated in evidence, but during or after the construction of the pier, the Glenwood company applied to the Department of Public Works at Ottawa for approval of their plans for a wharf and ten piers in Lake Erie. The company had apparently acquired an additional concession, as their application covered the front not only of lots 181 to 186 but lots 172 to 186. The application itself was not before the Court. Its purport in part can, however, be ascertained from recitals in the order in council of the 22nd January, 1914, approving a memorandum, dated the 13th December, 1913, of the Honourable the Minister of Public Works, stating that approval of the

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plans of the ten piers "might be granted" subject to certain conditions.

With several of these conditions the pier in front of the Baldwin farm does not comply. It is not surrounded by a talus composed of stones of not less than one ton each. An automatic bell to indicate in a fog the position of the pier has not been installed, nor has a bright fixed red light to indicate the location at night and avert possible disaster to fishermen.

I find that the pier has been erected and is maintained contrary to law, and interferes with navigation. It affords no protection to fishermen. I should not feel called upon to state this obvious finding but for the evidence to the contrary of a gentleman who acts as Fishery Inspector while managing a Toronto theatre. Less positive testimony to the same effect was given by one Featherston, who occupies the dual and inconsistent positions of fisherman and fishery overseer. I credit, as against these and other persons more or less interested, practical men like Crewes and Captain Post. The pier is undoubtedly dangerous to fishermen in the rough weather which frequently prevails along the exposed north shore of Lake Erie.

The defendants have absolutely disregarded the conditions imposed by the order in council; but that is a matter giving the plaintiffs no right of action.

Additional piers, even if erected conformably to the conditions, will, of course, greatly add to the dangers now existing; and a situation may arise when it will be practically impossible for riparian owners to leave or reach their beaches in rough weather when the bar along the shores of the gas area in Romney and Tilbury East is dotted with piers, each undoubtedly as dangerous as a large rock. But that is not the situation at the present time.

Whatever may be the inconvenience and danger to which fishermen and the public generally may be exposed by the pier erected by the defendants, it is quite clear that, before the plaintiffs can obtain relief, they must establish that they have suffered some special injury over and above that suffered by the rest of the public. Apart from the slight interference with access and regress while the temporary platform was in place,

there has been, I find, no damage of a special character suffered by any of the plaintiffs.

It is, however, contended that the right of access of a riparian proprietor to a navigable water is a right of property distinct from the public right of navigation, an injury to which is actionable without proof of special damage: Coulson & Forbes' Law of Waters, 3rd ed., p. 111, citing *Rose v. Groves* (1843), 5 M. & G. 613; *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662; *North Shore R.W. Co. v. Pion* (1889), 14 App. Cas. 612; and other cases.

In *North Shore R.W. Co. v. Pion*, it was urged that any obstruction placed in navigable water would be an invasion of the private right of a riparian proprietor, for which an action would lie without proof of special damage. Their Lordships of the Judicial Committee determined, however, that whether an obstruction amounts to an interference with a private right of access or not is a question of fact to be determined in each case.

In each of the cases mentioned it was found as a fact that the obstruction did interfere with a private right.

The distinction is well illustrated in *W. H. Chaplin & Co. Limited v. Westminster Corporation*, [1901] 2 Ch. 329, between a private right and an individual interest in a public right. In that case an injunction was sought to prevent the defendants from erecting a lamp post in Villiers street, Strand, in such a position as to cause obstruction to the plaintiffs as occupiers of adjacent premises. Buckley, J., at p. 334, says: "They" (the plaintiffs) "have a special and individual interest in the public right to this portion of the highway . . .; but the right which they seek to exercise is not a private right, but a public right. A person who owns premises abutting on a highway enjoys as a private right the right of stepping from his own premises on to the highway, and if any obstruction be placed in his doorway, or gateway, or, if it be a river, at the edge of his wharf, so as to prevent him from obtaining access from his own premises to the highway, that obstruction would be an interference with a private right. But immediately that he has stepped on

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to the highway, and is using the highway, what he is using is not a private right, but a public right."

In the case at bar, the pier is not an interference with the plaintiffs' right of access, but merely with the public right of navigation enjoyed by the plaintiffs in common with others of the public.

I therefore feel obliged to hold—notwithstanding the unwarranted acts of the defendants in obstructing navigation without authority from the only source competent to grant it, and in failing to comply with the principal conditions imposed by the order in council—that the plaintiffs are not entitled to the relief which they claim. Damages are not specifically asked for the interference with the plaintiffs' access and regress caused by the temporary platform, and, if asked, they would be so trivial as not to merit consideration.

I therefore dismiss the action, but without costs.

The plaintiffs appealed from the judgment of LATCHFORD, J.

March 18 and 19. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*J. G. Kerr*, for the appellants, contended that their riparian right of access was a right of property, and was interfered with by the pier erected by the defendants, and that the appellants were entitled to relief in respect of their right to use their land in the future; that the defendants' obstruction of the navigable waters of the lake was without statutory authority, and that they had not complied with the conditions set forth in the order in council; that the plaintiffs' rights were not rights in common with the general public, but were peculiar to themselves; that the defendants' pier was a source of danger in rough weather. The case comes within the rule laid down in *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839. Reference also to Farnham's Law of Waters, vol. 1, pp. 279, 287, 290; the Navigable Waters' Protection Act, R.S.C. 1906, ch. 115, secs. 7 and 8, and the amending Act, 9 & 10 Edw. VII. ch. 44, repealing secs. 4 and 5, and substituting new sections; Halsbury's Laws of England, vol. 28, pp. 393, 394, para. 749; *Warin v. London and Canadian*

*Loan and Agency Co.* (1885), 7 O.R. 706, 12 A.R. 327; *London and Canadian Loan and Agency Co. v. Warin* (1886), 14 S.C.R. 232; Encyc. of the Laws of England, vol. 14, p. 631; *San Francisco Savings Union v. R. G. Petroleum and Mining Co.* (1904), 144 Cal. 134; *Yates v. Milwaukee* (1870), 10 Wall. (U.S.) 497; *Thornton on Oil and Gas* (1904), p. 334; *Attorney-General v. Terry* (1874), L.R. 9 Ch. 423; *Reeves v. Backus-Brooks Co.* (1901), 83 Minn. 339, 343; *Lake Superior Land Co. v. Emerson* (1888), 38 Minn. 406; *Falls v. Belfast and Ballymena R.W. Co.* (1849), 12 Ir. L.R. 233; *O'Neil v. Harper* (1913), 28 O.L.R. 635; *Marshall v. Ulleswater Steam Navigation Co.* (1871), L.R. 7 Q.B. 166, 172; *W. H. Chaplin & Co. Limited v. Westminster Corporation*, [1901] 2 Ch. 329.

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[MEREDITH, C.J.O., referred to *Booth v. Ratté* (1890), 15 App. Cas. 188.]

*J. W. Bain, K.C.*, and *Christopher C. Robinson*, for the defendants, respondents, relied on the reasons for judgment given in the Court below; and contended that the action was vexatious; that the plaintiffs had suffered no damage; that their right of access had not been interfered with; that the plaintiffs could not build out from their land upon the water lots leased to the defendants; and that no special damage was shewn. They referred to *Coulson & Forbes' Law of Waters*, 3rd ed., p. 112; *Liverpool and North Wales Steamship Co. v. Mersey Trading Co.*, [1908] 2 Ch. 460, [1909] 1 Ch. 209; *Attorney-General v. Conservators of the Thames* (1862), 1 H. & M. 1, 31; *Metropolitan Board of Works v. McCarthy* (1874), L.R. 7 H.L. 243; *Macey v. Metropolitan Board of Works* (1864), 10 L.T.N.S. 66, 33 L.J. Ch. 377; *Belfast Rope Works Co. v. Boyd* (1887), 21 L.R. Ir. 560; *Palmer v. Persse* (1877), I.R. 11 Eq. 616; *Bell v. Corporation of Quebec* (1879), 5 App. Cas. 84, 93; *Caledonian R.W. Co. v. Ogilvy* (1886), 2 Macq. H.L. Sc. 229, 236, 237, 249; *Martin v. London County Council* (1899), 80 L.T.R. 866.

[MEREDITH, C.J.O., referred to the Act respecting Sale and Management of Public Lands, 23 Vict. ch. 2, sec. 35.]

*Kerr*, in reply.

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April 26. The judgment of the Court was delivered by HODGINS, J.A.:—The appellants, the plaintiffs in the action, are owner and lessee of lot 185 on the Talbot road west, in the township of Romney, the patent for which from the Crown describes the lot as running to and along the water's edge of Lake Erie, and contains a reservation of an allowance for road one chain in width along the top of the bank of Lake Erie, and free access to the shore for all vessels, boats, and persons. They have also a fishing license in front of this and other lots.

The respondents have erected and are now maintaining a pier in the waters of Lake Erie opposite this lot. It consists of a structure 6 feet by 6 feet, about 8 feet in height over high water level, surrounded or to be surrounded with a system of timber piles armoured with concrete, occupying an area of 24' by 24' in size.

This structure is situated about 250 feet from the shoreline, and is said to be an obstruction to the appellants' access to the lot, the frontage of which on the lake is 300 feet. It is built on a bar of sand on which the water is shallower than between it and the shore, so that the appellants' fishing vessels and scows, used in transporting and landing fish, nearing the shore and desiring to approach lot 185, would be unable to turn at right angles to the sand-bar and to cross it in that direction. No wharf has been built by the appellants, and at present the shore is a mere strip of sand. There are no fishing operations which necessitate landing on this lot. The danger from the pier is, therefore, a matter of apprehension, not of present fact.

The respondents are or represent the lessees from the Crown in right of the Province of Ontario of the land covered by the waters of Lake Erie in front of the Talbot road, lots 181 to 187 inclusive. These water lots contain 608 acres, more or less, of land covered with water. The lease includes the right, as part of the grant, to dig and bore for petroleum and natural gas and to remove the same. The term is ten years from the 1st April, 1911, and the habendum is made subject to certain provisoes, provisions and stipulations, of which the following are material:—

“1. The lessee shall, within one year from the date hereof,

commence drilling on the said land for petroleum oil and natural gas, and shall within the said time have erected and in operation a plant and machinery suitable for such drilling."

"5. The lessee shall not in any way interfere with navigation or with the use of any docks or wharves now existing or that may be hereafter constructed on or built out from the shore upon the waters covering any part of the land hereby demised or with the right of access to the water by the riparian proprietors."

"7. The right is reserved to us to remove and allow others to remove any gravel or sand from the said land, and to grant such parts of said land for water lots and wharf purposes as may be deemed necessary."

Subsequent to the obtaining of this lease, the respondents obtained from the Governor-General in Council permission, on the 22nd January, 1914, to erect the pier in question, subject to certain conditions.

The report of the Committee of the Privy Council thereon which was approved contains this recital:—

"That protests have been received against the approval of the plans in question from fishermen and owners of lands abutting on the waters of the lake, in the townships mentioned, and also from various municipal councils, these protests being based chiefly on the following grounds:—

"1. That the works in question would form an obstruction to navigation."

(The other objections are not pertinent to the matters now in question).

The permission finally given was, that approval of the plans submitted and also of the description of the site thereof was granted subject to certain conditions. So far as these are material at present only condition No. 4 is important, and it is as follows: "4. The company shall maintain permanently from April 1st to December 15th, in each year, on each pier, an automatic bell to indicate their position in fog, and a bright fixed red light to indicate their position at night, subject to the same rules and regulations which govern lighthouses etc. under the control of the Department of Marine and Fisheries. All

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other works of whatsoever description to be undertaken by the company must first be submitted to the Department of Public Works for approval before the work or works are commenced..''

It is not denied that this condition and others dealing with the structure itself have not been complied with. On the 12th November, 1914, the latter conditions were amended by a new order in council reducing the area of the piers and providing that they should be surrounded with a system of timber piles armoured with concrete, occupying an area of 24' by 24' in size, the piles being capped with 10" by 12" timber and floored with 4" thick flooring, in accordance with the plan attached thereto, and that all the work was to be performed to the entire satisfaction of the Chief Engineer of the Department of Public Works of Canada and in accordance with said plan or further plans to be submitted to the Department of Public Works for approval before the works are commenced.

Under these circumstances, and assuming that the provisions of the last Dominion order in council have now been or will immediately be complied with, the questions to be decided are:—

(1) Has the erection complained of interfered with the right of access to which the appellants as riparian proprietors are entitled, or with any other right of the appellants in respect to navigation, having regard to the fact that they do not question the right of the Ontario Government to grant the recited lease of the water lot in front of lot 185?

(2) Assuming compliance with the stated conditions, does the permission of the Governor-General in Council to erect the obstruction absolve the respondents from liability, in view of the fact that the Navigable Waters' Protection Act, R.S.C. 1906, ch. 115, is confined to dealing with obstructions to navigation solely?

At the trial, a plan, exhibit 6, was put in, and evidence was given that, if the dock shewn therein was erected, it would be difficult of access while the pier in question was maintained and while it remained without lights or bell. Some of the evidence upon the point was as follows:—

McCubbin, a Chatham engineer, who prepared exhibit 6,

says he located the suggested dock himself and placed it where he thought suitable, but did not examine the depth of the water there into which it would project.

Crewes, a pound-net fisherman in Lake Erie, says (p. 25) :—

“Q. What did you say about leeway? A. We have not got control enough of our boats to know exactly where they are going in a rough sea. They are flat-bottomed, they have no centre-board, and in swinging around so much it would really not be any carelessness to vary a matter of fifty feet or so in knowing where we were.

“Q. In what way would this pier interfere with that? A. In coming into this dock. For instance, take outside a little piece from the shore, there are bars, there is one bar coming out of deep water to the shallower water, there is a shallow place all along that shore, and deeper water inside; the rough weather strikes that bar very hard; coming up or down the lake and wishing to turn in there, we keep in the deeper water when the weather is rough, and when turning his boat a man would naturally want to run straight over that bar and into his dock when he did so.

“Q. Where is the bar as compared to the pier? A. I suppose the bar would be where the pier was, or a little farther out.

“Q. In coming in you would like to cross that and run straight in to the dock? A. That would be the better way. We don't want to cross that before, and in any case you must cross that straight; you must not cross it at an angle.”

Post, a fish merchant and master mariner, says:—

“Q. Why would it be detrimental? A. Coming in there in bad weather, or in the night, without anything to guide you, you are liable to get on top of it. . . .

“Q. You say there is danger of running on to it? A. Would be without anything to guide you.

“Q. Or in the night? A. Yes.

“Q. Why is there that danger. A. It could be avoided if it was lit up with a light.

“Q. But in day-time? A. In day-time you could avoid it.

“Q. In wet weather? A. Certainly you could.

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"Q. In what way? A. By going one way or the other, going around it.

"Q. How far away? A. Depends on the weather.

"Q. Rough stormy weather? A. You would want to go 100 or 200 feet around it. . . .

"Q. You might see it? A. Yes, that is, you could get close enough to avoid it. Very seldom we have a fog that you cannot see 50 or 75 feet.

"Q. If there were a fog and rough weather what would you say? A. It would be dangerous."

In cross-examination he says (p. 43):—

"Q. If in darkness you had a beacon light, or if in a fog a bell, a master mariner would not run against that pier? A. Not if he is sober.

"Q. And if there was a beacon light or bell no reason why he should come in contact with it? A. No.

"Q. That far from the shore, 250 feet, you would not anticipate any great trouble getting around it? A. No. . . ."

In re-examination:—

"Q. What would you say as to a man who wanted to approach the shore in stormy weather, to get into a dock like the dock on exhibit 6? A. He would make his calculations outside, and go one side or the other.

"Q. He would have to avoid that? A. Yes.

"Q. These are on the bar, these gas-wells? A. Yes, and the bar runs parallel to the shore.

"Q. Is the water rougher there. A. Yes. If there is any sea at all the sea breaks there and makes combers.

"Q. In that case do you need more leeway? A. You would want more room; wouldn't want to go very close to that. Your boat is liable to be thrown in the trough of the sea and turned around on you.

"Q. Might she strike the pier? A. Yes, unless you kept away 100 or 200 feet.

"Q. That is the danger, on account of the bar being there? A. Yes."

Goodwin, engaged in the fishery business, says (p. 47):—

"Q. Explain why? A. Well, when you are going out, for in-

stance, if there is a sea, your engine won't always go right; when you start out, you must drive up against it. That is, if it is close enough, without you had time to get an anchor out, or something.

"Q. It would be a danger going out? A. I would think so. Your engine don't always go. Sometimes we get it started, maybe go 100 feet and stop, and then we have to prime the engine and start again.

"Q. While the engine? A. We would likely dash against there.

"Q. No control over your boat? A. No control."

N. Baldwin, one of the plaintiffs, says (p. 54):—

"Q. If you had a dock established there and a landing, what effect would it have to have a permanent structure of steel and concrete in the location of the present well? A. We would always have to be on the look-out for it; it would always be an obstruction, and always be in our way, I would think.

"Q. What kind of boats do you use? A. Gasoline flat-bottomed boats.

"Q. Difficult or easy to control? A. Sometimes they don't start when we leave the dock.

"Q. Flat-bottomed boats? A. Yes.

"Q. When a heavy sea is running how are they to handle? A. Well, they drift. You cannot always go where you want to.

"Q. Any centre-board or keel to them. A. No.

"Q. How are they affected by the wind? A. The wind blows them easily.

"Q. They are boats that plenty of leeway is required? A. Yes.

"Q. And in the handling of that scow, is it easy or difficult to handle? A. That is difficult to handle. You should have calm weather.

"Q. And how much room do you require for the scow? A. We should have a couple of hundred feet anyway. . . .

"Q. If you had to make a landing or had to go out in the dark, what effect would this gas-well have on your operations? A. Well, if it is calm weather we would get around it. Rough weather it would be dangerous."

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I quote these few extracts from the evidence in order to shew that what is being asserted in this action as a private riparian right of access is in reality a public right of navigation. The right to land on the present beach is not in question; it is not used; if it were, an obstruction 250 feet out in the water would form no barrier to landing on the strand at any part of it. What is really set up is that if and when a dock is built, at a suitable place on the appellants' lot, and if and when in the operations of a fishery it becomes necessary to get in to this dock with the present fishing outfit of vessels, access will be rendered difficult. But the difficulties and dangers apprehended are in reality those common to all who navigate Lake Erie, and are to be met and guarded against only by skilful navigation. If the dock were in actual existence and use, it would still be a question whether the right would be in anywise different in kind, because the effect of leeway in stormy weather, the proper angle of approach, the effect of the shoal parallel with the line of the beach, the distance to be kept, and the danger caused by the want of bell and light, are all pure questions of navigation, or perils to be guarded against from that point of view.

The general principle is thus stated in Halsbury's Laws of England, vol. 28, p. 395, para. 752: "Interference with the private right of access is actionable without proof of special damage; but if the interference complained of is an interference with the right of navigation, which thereby affects the right of access, then special damage must be proved, for interference with the right of navigation which only renders access more difficult, but not impossible, is an interference with a public and not a private right, and special damage must be proved by the riparian owner who complains of such interference."

What is called the private right of access in the above quotation is, as pointed out by Lord Selborne in *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662, at p. 684, something given by virtue of and in respect of the riparian property, and is wholly distinct from the public right of navigation.

Lord Hatherley, when Vice-Chancellor, in speaking in *Attorney-General v. Conservators of the Thames*, 1 H. & M. 1, of the

approach to a wharf being impeded but not blocked up, says (p. 33): "But, in truth, the access is not blocked up. The wharf will not be as readily and easily approached, and perhaps not at all by the same route; but that is a mere interruption to the navigation of the river which they enjoy in common with the public, and not as part of their special right of access. Persons who frequent either this or any other wharf will be impeded, to a certain extent, in the navigation of the river; but that is an injury to the general right of navigation. It amounts only to this, that the plaintiffs' goods will have to take a longer and less convenient course in coming up to their wharf; an inconvenience the same in kind, though not in degree, as that which the rest of the public will be exposed to. The right interfered with is not the private right of access, which still remains, but the right of approaching from a distance, which forms part of the public right of navigation."

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It was, however, urged that this case comes within the rule laid down in *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, by Lord Blackburn. He there said (p. 853) that the principle of *Bickett v. Morris* (1866), L.R. 1 H.L. Sc. 47, was that where any unauthorised erection (even on the other side of the river) is a present sensible *injuria* to the proprietary right of an individual, if it is impossible to predicate that it may not produce serious damage in the future, though the complaining party is not in a position to qualify present damage, there is *injuria* for which he might recover. And again on p. 854: "Unless there is a present interference with that right, or it can be shewn that what is now done will necessarily produce effects which will interfere with that right, there is no *injuria*, and I think that if there be no *injuria*, the foundation of the right to have the thing removed, fails."

The idea which is really embodied in these citations is that there must be a present damage, and that present damage is proved if it is shewn that the necessary consequence of the obstruction is to produce injurious results in the future to the existing use. But that is a something distinct from the injury apprehended if a different use is contemplated. For, as said in

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Coulson & Forbes' Law of Waters, 3rd ed., p. 134: "The rights of riparian owners existing, as has been said, *ex jure naturæ*, and not depending on any presumed grant from the other riparian owners, are not limited by the present mode of enjoyment, and a new code of enjoyment gives a right at once to sue for an injury done in respect of such new uses."

It is not therefore the prospective use that gives the right to claim damages or an injunction. It is the present use that must determine whether injury is suffered, although slight, or will necessarily or inevitably follow from the present obstruction, having regard to existing conditions. If a new use springs up, then a new right arises. That which produced no harm when access was not required may be detrimental when the property is put to a different use. This case is not one in which compensation is being fixed for all time, but only one of actual damage by what is now done. It is naturally impossible to estimate present damage to things not *in esse* and to a use only in contemplation and dependent on the method of carrying out future plans, and equally so to grant an injunction based upon the position and use of an imaginary wharf.

In *Bell v. Corporation of Quebec*, 5 App. Cas. 84, the Judicial Committee, in discussing the question of depreciation, say that speculations of future changes in the use and employment of the property and of artificial improvements which might be made in the navigation were the basis of the opinions in the Court below. But the latter was inadmissible, and as to the former the Court below were not convinced that the farm in question, which had apparently no landing place, and whose owners had never used the river as a means of transport for conveying anything to or from it, was, having regard to the state of navigation of the river described, really depreciated in value.

I do not think that the appellants' position is helped by the cases which hold that an obstruction at some distance from the shore may afford a cause of action if they render access more difficult. Those decisions, when examined, shew clearly that it is only when the obstruction, though distant, affects the present convenient user just as essentially as if close at hand, that the right is held to be infringed.

In the case last quoted this question is thus dealt with at p. 100: "When this access is not interrupted, and the waterway of the river is open to the riparian land, the question will arise for decision whether the right of action of the riparian proprietor for a distant obstruction in the river can be based on higher or other ground than would be that of any one of the public using the river and sustaining special damage; though his being such proprietor would obviously be an important element in the question whether such damage had in fact been sustained."

The point thus left undecided has however been further considered. In *Farnham on Waters*, vol. 1, p. 437, para. 95a, it is said: "If, however, a riparian owner is cut off from access to his property by the obstruction, he suffers injury different in kind from that of the public generally, and may maintain the action. And true principle extends this rule so as to give a right of action to one whose communication between his property and the general system of waterways is cut off by an obstruction in the waterway between his property and such system."

In *Brayton v. City of Fall River* (1873), 113 Mass. 218, 229, where a city had obstructed by allowing refuse from a sewer to collect, the Court said: "If . . . the effect of the defendants' acts had been merely to create a bar across the mouth of the creek, so as to destroy or injure its navigability, the plaintiff could not maintain an action because it was thereby rendered more difficult and expensive to reach his wharf, or because his wharf was rendered less valuable. Those would be injuries of the same kind sustained by all other persons who have occasion to use the creek."

In *Drake v. Sault Ste. Marie Pulp and Paper Co.* (1898), 25 A.R. 251, there is a valuable statement of law in the judgment of Osler, J.A., at p. 256: "It is not easy to reconcile all the cases which have been decided on this subject, that is as to what is sufficient to cause that special damage which entitles a person in the position of this plaintiff to maintain an action. Had the obstruction in the river occurred *ex adverso* his premises and thereby prevented his access to and from the river or

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rendered it less convenient than it otherwise would be, the case would have presented no difficulty. Here, however, the waterway of the river is open to and from the riparian land, and the obstruction occurs at some little distance from the latter, though it is quite as effectual to interrupt the plaintiff's substantial user of the river as a means of access to and from his land and to and from the larger and more extensive highway into which the river leads as if the access to the actual frontage of the land had been interrupted. Nevertheless, the plaintiff's user of the river has been, in fact, from time to time actually obstructed, with the result that he has been compelled to unload his vessel when coming up the river on arriving at the point where the obstruction commenced, and then to portage or carry his goods overland until he could enter the river again at the point where it ended and ship them again into another vessel. This appears to me enough to constitute that damage peculiar to the plaintiff beyond that suffered by the rest of the lieges which entitles him to maintain the action within the principle of such cases as *Rose v. Miles* (1815), 4 M. & S. 101, and *Crandell v. Mooney* (1873), 23 U.C.C.P. 212; and it may perhaps also be sustained on the principle suggested in the judgment of the Privy Council in the case of *Bell v. Corporation of Quebec*, 5 App. Cas. 84, 100, the access to and from the plaintiff's frontage being for most practical purposes substantially interrupted by the obstruction, though it occurs, in fact, at some distance therefrom." In the same case Moss, J.A., at p. 258, says: "The river is a highway, and as regards obstructions there appears to be no distinction between it and a highway on land."

Having regard to the similarity of a highway on land to a highway on water, the statement of the Law Lords in *Caledonian R.W. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259, 285, is instructive: "A right of access by a public road to particular property must, no doubt, be proximate, and not remote or indefinite, in order to entitle the owner of that property to compensation for the loss of it; and I apprehend it to be clear that it could not be extended in a case like the present to all the streets in Glasgow through which the respondents might from time to time have occasion to pass for purposes connected with

any business which they might carry on upon the property in question. But it is sufficient for the purposes of the present appeal to decide that the respondents' right of access from their premises to Eglinton street, at a distance of no more than ninety yards, was direct and proximate, and not indirect or remote."

Other cases dealing with this phase of the subject are: *O'Neil v. Harper*, 28 O.L.R. 635; *Re Taylor and Village of Belle River* (1910), 1 O.W.N. 609, 15 O.W.R. 733; *Rex v. McArthur* (1904), 34 S.C.R. 570.

In all these cases, it will be observed, the present and practical deprivation of access by distant obstructions may give a right of action. But here this element does not, as I have mentioned, exist, and hence these decisions do not further the appellants' case.

It must be borne in mind as a cardinal principle that whether the obstruction amounts to an interference with the riparian right of access is a question of fact to be determined by the circumstances of each particular case: *Bell v. Corporation of Quebec*, 5 App. Cas. 84; *Drake v. Sault Ste. Marie Pulp and Paper Co.*, 25 A.R. 251, 257, *per Moss, J.A.* And the existence of special damage must likewise be so determined.

Applying these considerations to the case in hand, it appears to me to be clear that the appellants cannot sustain their action, on the point that there is in fact interference with their riparian right of access, and that the suggested user of their lot cannot support, under present conditions, a claim for damage.

There remains the further question, namely, whether the order of the Governor-General in Council, under the Navigable Waters' Protection Act, absolves the respondents from liability. The appellants do not deny the power of the Province to lease the water lot in front of lot 185. That lease reserves to the Province the right to grant parts of the lot for wharf purposes, i.e., to the appellants or to any one else, and prohibits the respondents from interfering with navigation or with use of any docks or wharves that may be hereafter construed, or with the right of access to the water by the riparian proprietors. Such a grant to the appellants of the privilege of building a wharf out

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into the water may again bring the appellants and respondents into collision; but, as I have said, that question does not arise now. The Dominion order in council, resting as it does upon an Act of Parliament, supplies the authority necessary to validate the respondents' acts if they have carefully observed its provisions: *Toronto Electric Light Co. v. City of Toronto* (1915), ante 267. They cannot, however, use this grant of the land under the water as an excuse for putting up erections interfering with the right of riparian access or the larger right of navigation: *Warin v. London and Canadian Loan and Agency Co.*, 7 O.R. 706, 12 A.R. 327; *London and Canadian Loan and Agency Co. v. Warin*, 14 S.C.R. 232; *Cullerton v. Müller* (1894), 26 O.R. 36; *Wood v. Esson* (1884), 9 S.C.R. 239; *Seely v. Kerr* (1909), 4 N.B. Eq. 184, 261; *Kerr Co. Limited v. Seely* (1910), 40 N.B.R. 8; *San Francisco Savings Union v. R. G. Petroleum and Mining Co.*, 144 Cal. 134.

It is clear that the respondents had not in fact complied with the Dominion order in council at the time this action was commenced. Whether they have done so now, having regard to the later order in council, is still an open question. But they have not supplied the lights nor the bell. The pier was, when the writ was issued, a common law nuisance and an obstruction to public navigation. The appellants had a right to sue, having regard to their special interest under their fishery license, which extends in front of lot 185 and others adjoining, without joining the Attorney-General of the Dominion. But the right they seek to enforce is, notwithstanding that fact, a public right—a right of navigation. Although they have to navigate these waters more often than others in order to fish, and to go and come for that purpose, the evidence establishes that, so far as fishing is concerned, its operations, both as to setting and hauling the nets, takes place outside this obstruction, and that it is only in the going and coming that the pier, if lot 185 was in use, would be in any sense a nuisance.

The case of *W. H. Chaplin & Co. Limited v. Westminster Corporation*, [1901] 2 Ch. 329, which was cited and much discussed on the argument, does not lay down any new law nor treat it in any novel aspect. The particular interest of the

appellants in the waters in question is founded on their fishing license. They frequent the waters in the exercise of their fishing rights, but in order to do so they must navigate them, and in navigating them they use them in no different way from the rest of the public. If the pier interfered with the setting out of the nets or the hauling in of them, or in fact with any other fishing operation, the license might supply the element which was lacking in the plaintiffs' position in the *Chaplin* case. But unless that can be found as a fact—and there is no support for such a conclusion found in the evidence or in the judgment in appeal—the law of the highway must necessarily govern. The right of navigation is not a property right but a right of way, and the fishing license in the waters in question does not differ in its essentials from the property right of access to and from a particular lot or wharf, if regarded as the foundation of an action against interference.

There can be no doubt that the Navigable Waters' Protection Act was intended to give the Governor-General in Council statutory authority to permit the erection of what would otherwise be a common law nuisance in navigable waters: *In re Provincial Fisheries* (1896), 26 S.C.R. 444, 516; *Regina v. Port Perry and Port Whitby R.W. Co.* (1876), 38 U.C.R. 431, 443.

If, as I have indicated, neither the appellants' riparian privileges nor their fishing rights afford them at the present time a right to damages or an injunction by reason of the pier complained of, their action must fail. But, as the respondents have not shewn compliance with the order in council, which alone would enable them to erect and maintain the pier, I think the dismissal of the appeal should be without costs. The respondents are unable to shew legal authority for what they have done, while the appellants have not shewn that the unlawful erection is a present cause of damage to them.

*Appeal dismissed without costs.*

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[APPELLATE DIVISION.]

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## RE COTTER.

*Will—Construction—Incomplete Devise—Implication — Gift over in one Event—Trust—Death of Trustee in Lifetime of Testatrix—Residuary Gift—Death of one Beneficiary—Intestacy as to her Part—Validity of Gift to Remaining Beneficiaries—Costs.*

By her will, executed in 1901, the testatrix appointed her daughter M. sole executrix and trustee; by the 2nd clause, she gave, devised, and bequeathed to her trustee a house and lot "to be held by my said trustee in trust for my grandson H. until he arrives at the age of twenty-six years, but in case he should die before arriving at that age, then my said trustee shall dispose of said property as she is hereinafter directed to dispose of the residue of my estate;" and by the 4th clause, the testatrix gave, devised, and bequeathed to her daughter M. "all the rest residue and remainder of" her estate, real and personal, "in trust to pay firstly, all my just debts funeral and testamentary expenses as soon as convenient and to divide the balance between herself and my grandchildren in such shares and in such manner as to her shall seem best." The testatrix died in March, 1907, and her daughter M. died a year earlier. The grandson H. attained the age of twenty-six, and claimed the house and lot:—

*Held*, that H., not having died under the age of twenty-six, took the property as devisee by implication from the terms of the will, and was absolutely entitled to it.

*Cropton v. Davies* (1869), L.R. 4 C.P. 159, and *Wilks v. Williams* (1861), 2 J. & H. 125, 128, applied and followed.

*Seem*, that the provision that in case H. should die before attaining the age of twenty-six the trustee should dispose of the lot "as she is hereinafter directed to dispose of the residue of my estate," was a gift over of the beneficial interest in the lot to the persons who were to share in the distribution of the residuary estate.

*Held*, also, that the gift to M. of the residue in trust did not lapse by reason of the death of M. in the lifetime of the testatrix; and that the residue was divisible equally between the grandchildren of the testatrix who survived her and M., and that there was an intestacy as to the latter's share.

*Held*, also, that the costs of an application for a declaration of the true construction of the will and of an appeal by H. from the order made on that application should be paid by H. or out of the property devised to him.

Judgment of LENNOX, J., varied.

MOTION by the Trusts and Guarantee Company, administrators (with the will annexed) of the estate of Elizabeth Cotter, deceased, for an order determining certain questions arising upon the terms of the will, in the administration of the estate.

The motion was heard by LENNOX, J., in the Weekly Court at Toronto.

*G. D. Conant*, for the applicants.

*G. N. Shaver*, for Robert Henry Johnston.

*D. Urquhart*, for Honora Ann Welsh.

*F. W. Harcourt*, K.C., for the infants.

March 5. LENNOX, J.:—The deceased appointed her daughter Margaret Brimacombe executrix of her will and trustee of her estate and devised all her estate to her, except perhaps some money she had on deposit in the York County Savings Company, which was non-existent at the time of the testatrix's death.

The executrix died, without issue, in the lifetime of the testatrix, and the Trusts and Guarantee Company were appointed administrators with the will annexed.

The clauses of the will causing difficulty are:—

“Second, I give devise and bequeath unto my said trustee my house and lot on the west side of Simcoe street in the said town of Oshawa and being part of lot number nine as marked on J. B. Warren's plan to be held by my said trustee in trust for my grandson Harry Johnston until he arrives at the age of twenty-six years, but in case he should die before arriving at that age, then my said trustee shall dispose of said property as she is hereinafter directed to dispose of the residue of my estate.”

“Fourth, I give devise and bequeath unto my daughter Margaret Brimacombe all the rest residue and remainder of my estate real and personal of whatsoever kind and nature and wheresoever situate in trust to pay firstly all my just debts funeral and testamentary expenses as soon as convenient and to divide the balance after payments of debts and funeral expenses between herself and my grandchildren in such shares and in such manner as to her shall seem best.”

Harry Johnston lived to attain the age of twenty-six years and is still living, and there are a great many other grandchildren of the testatrix, ten in all.

I am asked, what estate or interest does Harry Johnston take under clause 2? It is argued for him that he takes the fee simple of the lands. I do not think so. What he takes he takes through the trustee, and I see nothing to indicate that the testatrix intended to benefit him *under this clause* in any case beyond the age of twenty-six; after that time, or upon his death in the meantime, the lot was to become part of the residuary estate, and to be disposed of under the 4th clause. Provision was made for him, after he attained twenty-six, as a grandchild, in another way.

Question 2: “If the said Robert Henry (Harry) Johnston

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takes less than a fee simple interest in the property aforesaid, does the remaining interest form part of the residue to be disposed of as directed by the 4th paragraph of the said will, or is the said remainder to be distributed as upon an intestacy?"

Subject to the limited interest conferred upon Harry Johnston, the testatrix died intestate as to this lot if effect cannot be given to clause 4 by reason of the death of the trustee—if effect can be given to this clause, then this lot and the other undisposed of land or effects, referred to upon the argument, fall into the residuary estate, and the whole is to be distributed as nearly as may be according to the provisions of the residuary clause of the will.

Contrary to the weight of argument addressed to me upon the motion, I am of opinion that there is nothing to prevent the Court from giving effect to the residuary clause, and that the testatrix did not die intestate as to any of her estate, real or personal. The question is of practical importance, as upon an intestacy Honora Ann Welsh, a daughter of the testatrix, would take in preference to her six children, grandchildren of the testatrix; but, if the otherwise undisposed of estate is governed by the 4th clause, she takes nothing.

If a trust is clearly created, the Courts will not allow it to fail for want of a trustee. I think the property intended to be included in the residuary clause is clearly impressed with a trust in favour of Margaret Brimacombe and the grandchildren of the testatrix, or such of them as were living at the time of her death. I make no distinction between the trustee, herself a beneficiary, and the other beneficiaries. It is true that a discretionary power is conferred upon the trustee, and she was not to be bound to divide equally, but she was bound to give each a "share," and the Court in such case would restrain her from giving a purely illusory share. The *prima facie* right was to have an equal division, and it was not intended that the trustee should act capriciously or dishonestly. The Court cannot exercise the personal discretionary power conferred upon the trustee, but is in a position to carry out substantially the intention of the testatrix.

The property included in the residuary clause—and it in-

cludes the lot described in the 2nd clause—in my opinion should be distributed according to the number of grandchildren living at the death of the testatrix, the share of each being increased by the share which Margaret Brimacombe would have taken had she survived.

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If it appears necessary that a trustee should be appointed, I may be spoken to, or it may be made the subject of a substantive motion.

Costs of all parties out of the estate.

Robert Henry Johnston appealed from the judgment of LENNOX, J.

March 30. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*G. N. Shaver*, for the appellant.

*D. Urquhart*, for Honora Ann Welsh.

*E. C. Cattnach*, for the Official Guardian.

*G. D. Conant*, for the Trusts and Guarantee Company.

The arguments of counsel and the authorities cited are referred to in the judgments.

April 26. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by Robert Henry Johnston from the judgment of Lennox, J., dated the 5th March, 1915, whereby he declared that, according to the true construction of the will of Elizabeth Cotter, (1) the appellant, having attained the age of twenty-six years, took no estate or interest in the house and lot on the west side of Simcoe street, in the town of Oshawa, other than as a grandchild and under the last clause of the will, and (2) that the residuary estate is to be divided equally among the grandchildren alive at the date of the death of the testatrix.

The will is dated the 22nd April, 1901; and by it the testatrix appointed her daughter Margaret Brimacombe sole executrix and trustee of the will; by the 2nd paragraph, she gave, devised, and bequeathed to her trustee the house and lot in Oshawa “to be held by my said trustee in trust for my grandson Harry Johnston” (the appellant) “until he arrives at the age of twenty-

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six years, but in case he should die before arriving at that age, then my said trustee shall dispose of said property as she is hereinafter directed to dispose of the residue of my estate;" by the 3rd paragraph, the testatrix bequeathed to her daughter Honora Ann Welsh all the moneys the testatrix should have at the time of her decease deposited in the York County Savings Company; and by the 4th paragraph the testatrix gave, devised, and bequeathed to her daughter Margaret Brimacombe "all the rest residue and remainder of" her estate, real and personal, of whatsoever kind or nature or wheresoever situate, "in trust to pay firstly all my just debts funeral and testamentary expenses as soon as convenient and to divide the balance between herself and my grandchildren in such shares and in such manner as to her shall seem best."

Margaret Brimacombe died on the 13th February, 1906, and the testatrix died on the 22nd March in the following year.

The first question is as to the effect of the devise of the Oshawa lot to the appellant.

It is contended by the appellant that, as he attained the age of twenty-six years, he has become absolutely entitled to the lot; that he takes it by implication in the event that has happened of his not having died under that age.

In *Cropton v. Davies* (1869), L.R. 4 C.P. 159, the testator by his will, dated the 17th February, 1855, devised three freehold houses in trust, as to the first two to receive the rents and pay them to his wife during life or widowhood and after her decease or second marriage as to the first upon trust to convey it to his daughter Elizabeth Annie, her heirs and assigns forever, as to the second on similar terms to his daughter Caroline Rogers, and as to the third "upon trust to apply the rents for the advancement and benefit of my granddaughter Mary Annie Clarke until she attains the age of twenty-one years; but, in case my said granddaughter should die under that age, then I devise the said dwelling-house and furniture to my daughters Elizabeth Annie Martin and Caroline Rogers Martin, their heirs and assigns, as tenants in common." The testator appointed his son Henry Martin and his daughters Mary Clarke and Annie Cropton executor and executrices of his will, and bequeathed to them

all the residue of his real and personal estate of whatsoever kind or description and not before specifically bequeathed, as tenants in common. The granddaughter Mary Annie Clarke attained the age of twenty-one years, and after the death of the testator's widow she claimed to be entitled to the freehold house, the rents of which the testator directed to be applied for her advancement and benefit until she should attain the age of twenty-one years, and it was held that she was so entitled, the Court being of opinion that it manifestly appeared "to have been the testator's intention to give the whole interest in the house, . . . to his granddaughter, to go over to his daughters Elizabeth Annie Martin and Caroline Rogers Martin only in a case which has not happened, viz., in case his granddaughter Mary Annie Clarke should die under twenty-one years of age" (p. 167); and Brett, J., who delivered the judgment of the Court, pointed out that, if this were not so, the strange consequence would follow, that, if the granddaughter died under twenty-one, the estate would go over to the daughters Elizabeth Annie Martin and Caroline Rogers Martin; whereas, if the granddaughter attained the age of twenty-one, it would go over to the residuary legatees, who are other persons, and added: "Such an intent cannot, we think, be presumed from the structure and language of the will."

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Such a result would not follow from the construction which my brother Lennox gave to the will in question, because the persons to take in both events are the same.

I do not understand, however, that the decision of the Court in *Cropton v. Davies* depended upon the circumstances to which Brett, J., referred, but that it was one of the circumstances which led the Court to the conclusion to which it came.

The principle of the decision is, I think, stated in the concluding words of the judgment, and is, that words such as those used by the testator in his devise in that case are sufficient to pass the whole interest, if, "looking to the language and to all the dispositions of the will, and the circumstances, there is an irresistible inference in favour of implying such a gift"—quoting from *Fitzhenry v. Bonner* (1853), 2 Drew. 36.

The principle upon which a gift of the whole interest in the subject of it is to be implied in such cases is more broadly stated



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by Vice-Chancellor Sir W. Page Wood in *Wilks v. Williams* (1861), 2 J. & H. 125, where he says (p. 128): "There is another class of cases, of which no one, I apprehend, will be disposed to disapprove, where it has been held, that, upon a devise or bequest, whether of real or personal estate, upon trust for the child or children of any person, until they attain twenty-one, followed by a gift over to a third person, in case the children do not live to attain twenty-one, there is a clear implication, that, if the children live to attain twenty-one, they are to take absolutely. With that class of authorities, whatever may be said of cases like *Newland v. Shephard* (1723), 2 P. Wms. 194, no one, I imagine, will be disposed to quarrel."

The leading text-writers, although they question the cases such as *Newland v. Shephard* in which it has been held that, even where there is no gift over, the devisee, on attaining the stated age, becomes entitled to the whole interest in the property, treat the law as being as stated by Page Wood, V.-C., and as applied by the Court of Common Pleas in *Cropton v. Davies*; and we should, I think, decide this case in accordance with it.

It was suggested during the argument that there is in the will in question no devise over in the event of the appellant dying before attaining the age of twenty-six years, but there is no foundation for the suggestion. The provision that in case he should die before arriving at that age the trustee shall dispose of the lot "as she is hereinafter directed to dispose of the residue of my estate," is clearly a gift over of the beneficial interest in the lot to the persons who are to share in the distribution of the residuary estate.

I would, therefore, substitute for the declaration which has been made a declaration that, in the events that have happened, the appellant is entitled to the whole estate and interest of the testatrix in the house and lot mentioned in the 2nd paragraph of the will.

The appellant also contends that, owing to the death of Margaret Brimacombe in the lifetime of the testatrix, the gift to her in trust contained in the last paragraph of the will has lapsed, and that there is an intestacy as to it; but that is clearly not so.

Where a devisor appoints a trustee, who dies in the testator's lifetime, the trust is not thereby defeated, but fastens on the conscience of the person upon whom the legal estate has devolved; and, in the case of an imperative power, which partakes of the nature of a trust, the Court protects a *cestui que trust* from the failure of the donee of the power, as it would do from the failure of any other trustee: Lewin on Trusts, 12th ed., pp. 1073-4; *Brown v. Higgs* (1803), 8 Ves. 561, 574; *Attorney-General v. Lady Downing* (1767), Wilmot 1, 23.

"When there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favour of the class:" *per* Lord Cottenham in *Burrough v. Philcox* (1840), 5 Myl. & Cr. 72, 92.

Where, as in this case, it has become impossible, owing to the death of the trustee in the lifetime of the testatrix, to make the division of the residue as the testatrix by the 4th paragraph of the will directs, the Court divides the subject of the gift equally between the *cestuis que trust* or the objects of the power: Jarman on Wills, 6th ed., p. 613.

As Margaret Brimacombe died in the lifetime of the testatrix, the gift to her of a share of the residue lapsed; she and the grandchildren of the testatrix did not form a class: *Kingsbury v. Walter*, [1901] A.C. 187; *In re Venn*, [1904] 2 Ch. 52. In the earlier of these cases the trust was for Elizabeth Jane Fowler, a niece of the testator, and the child or children of a sister of the testator named Emily Walter, who should attain the age of twenty-one years, in equal shares, and it was held that the testator intended to make one class of nephews and nieces, and that consequently there was no lapse by reason of the death, in the lifetime of the testator, of Elizabeth Jane Fowler, and that the other nephews and nieces took the whole. While that conclusion was reached on the special circumstances of the case, Lord Davey said (p. 193): "A gift to A. and all the children of B. is, in my opinion, *primâ facie* not a class gift, and I think that has been so decided and rightly decided, in the case

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*In re Chaplin's Trusts* (1863), 33 L.J. Ch. 183 . . . and also in a case before Sir George Jessel of *In re Allen, Wilson v. Atter* (1881), 29 W.R. 480, 44 L.T.N.S. 240." See also *In re Featherstone's Trusts* (1882), 22 Ch. D. 111, 120.

My conclusion on this branch of the case is, that the residue is divisible equally between the grandchildren of the testatrix who survived her and Margaret Brimacombe, and that there is an intestacy as to the latter's share.

The order appealed from provides that the costs of all parties "be paid out of the funds of the estate"—which means, I take it, that the burden of them is to fall on the residuary legatees.

As the main contention has been as to the effect of the devise to the appellant, the costs throughout should fall upon him and the property devised to him, and I would substitute for the order that has been made as to costs an order so providing. The appellant has failed in his contention that the residuary bequest has lapsed, although he has succeeded to the extent that it will be declared that the bequest of a share of it to Margaret Brimacombe has lapsed, and there is no injustice in leaving him and the property which he takes under the provisions of the 2nd paragraph of the will to bear the costs of the litigation. The administratrix and the Official Guardian will, of course, have their costs between solicitor and client.

*Appeal allowed in part.*

## [APPELLATE DIVISION.]

## MEAGHER V. MEAGHER.

1914

May 14.

1915

April 26.

*Will—Construction—Trust—Beneficial Estate for Life Given to Trustees nomination—General Power of Appointment over Corpus—Right of Donees of Power to Appoint to themselves—"Or otherwise."*

By clause 1 of his will, the testator devised and bequeathed all his estate to his two daughters (naming them) upon trust: (2) to pay debts etc.; (3) to pay for masses; (4) to pay legacies to grandchildren; (5) "to hold all my property in lots 8 and 9 . . . with all stock crops furniture . . . thereon for my said daughters" (naming the same two again) "for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they my said daughters in the meantime to have all the rents and profits therefrom:"—

*Held*, that there was a gift of the beneficial interest in the property to the two daughters; no trust of the beneficial interest in the corpus of the property was created; and the two daughters took beneficially for life, with a general power of appointment over the corpus—a power which they might exercise by appointing to themselves.

The words "or otherwise," while they might refer to the time of making the disposition, also included the objects of the gift.\*

*Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381, distinguished. *Gibbs v. Rumsey* (1813), 2 V. & B. 294, considered and applied.

Judgment of LENNOX, J., varied.

ACTION by George Meagher, one of the sons of Thomas Meagher, deceased, to have the probate of an instrument bearing date the 27th December, 1910, alleged to be the last will and testament of the deceased, set aside and delivered up to be cancelled, or, in the alternative, for a declaration of the true construction of clause 5 of the will.\*

March 10, 1914. The action was tried by LENNOX, J., without a jury, at Toronto.

A. R. Hassard, for the plaintiff.

E. F. B. Johnston, K.C., for the defendants Mary Ann Meagher and Margaret Ellen Meagher.

\*By clause 1, the testator devised and bequeathed all his estate to his daughters Mary Ann Meagher and Margaret Ellen Meagher upon trust: (2) to pay debts etc.; (3) to pay for masses; (4) to pay legacies to grandchildren; (5) "to hold all my property in lots 8 and 9 . . . with all stock crops furniture . . . thereon for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they . . . in the meantime to have all the rents and profits therefrom."

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**MEAGHER** *I. F. Hellmuth, K.C., for the defendants James and Michael Meagher.*

**MEAGHER** *E. D. Armour, K.C., and A. F. Lobb, K.C., for the defendants Thomas Meagher and John Joseph Meagher.*

*E. C. Cattnach, for the Official Guardian, representing the infant defendants.*

May 14, 1914. LENNOX, J.:—I disposed of the questions of fact at the trial, and reserved for consideration the meaning of the 5th clause of the will of the deceased Thomas Meagher. I am of opinion that that clause confers upon the testator's daughters Mary Ann Meagher and Margaret Ellen Meagher the absolute ownership of the personal estate and effects and the ownership in fee of the lands in that paragraph described, for their own exclusive use and benefit.

There was justification for inquiry both as to fact and law. It is, therefore, a case in which the costs of all parties should come out of the estate, were it not that all available assets have been distributed. In the circumstances, I shall dismiss the action without costs, except the costs of the Official Guardian, which will be paid by the beneficiaries in the 5th clause mentioned.

The defendant John Joseph Meagher appealed from the judgment of LENNOX, J., in regard only to the construction of clause 5 of the will.

March 30. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

*A. C. McMaster and J. H. Fraser, for the appellant and the respondents George Meagher and Thomas Meagher, contended that the trust was void for uncertainty (the word "otherwise" leaving the objects undefined), and the trustees did not take beneficially; if the word "otherwise" was used with reference to the time, and not the objects, of the disposition to be made by the trustees, the trust was for the benefit of all the children of the testator in equal shares. They referred to Briggs v. Penny (1851), 3 Macn. & G. 546; Yeap Cheah Neo v. Ong Cheng Neo (1875), L.R. 6 P.C. 381; Re Hislop (1915), 8 O.W.N. 52; God-*

*frey v. Godfrey* (1863), 8 L.T.N.S. 200; *Comiskey v. Bowring-Hanbury*, [1905] A.C. 84.

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*I. F. Hellmuth*, K.C., and *E. T. Coatsworth*, for the respondents Mary Ann Meagher and Margaret Ellen Meagher, argued in favour of the construction declared by the learned Judge, or, alternatively, in favour of a construction which gave these respondents the property for life with a general power of appointment over the corpus. They referred to *Hancock v. Watson*, [1902] A.C. 14; *Howorth v. Dewell* (1860), 29 Beav. 18; and, as to the meaning of the word "otherwise," to *Canadian Pacific R.W. Co. v. Carruthers* (1907), 39 S.C.R. 251.

*E. C. Cattnach*, for the Official Guardian.

April 26. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant John Joseph Meagher from the judgment of Lennox, J., dated the 14th May, 1914, which was directed to be entered after the trial before him, sitting without a jury at Toronto, on the 10th March, 1914; and the appeal is limited to that part of the judgment which declares the true construction of the 5th clause of the will in question.

The action is brought by George Meagher, one of the sons of Thomas Meagher, deceased, to have the probate of an instrument bearing date the 27th December, 1910, alleged to be the last will and testament of the deceased, set aside and delivered up to be cancelled, or in the alternative for the determination of the true construction of clause 5 of the will, the effect of which, as alleged, is that the respondents Mary Ann Meagher and Margaret Ellen Meagher hold the property mentioned in that clause upon "a secret trust" for the children of the deceased.

The learned trial Judge determined in favour of the validity of the will, and held that, upon the true construction of it, the respondents Mary Ann Meagher and Margaret Ellen Meagher take beneficially and absolutely the property mentioned in the fifth clause.

The will is as follows:—

"The last will and testament of Thomas Meagher, of the township of York, in the county of York, farmer, is as follows:—

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"1. For the purpose of carrying out the trusts contained in this my will I give devise and bequeath all the estate real and personal of which I die seized or possessed or to which I may be entitled at the time of my decease unto my daughters Mary Ann Meagher and Margaret Ellen Meagher upon trust as follows:—

"2. Immediately after my decease to pay all my debts, funeral and testamentary expenses.

"3. To pay Rev. Father Canning my Parish Priest one hundred dollars for masses.

"4. To pay each of my grandchildren one hundred dollars.

"5. To hold all my property in lots eight and nine in the third concession from the bay in the township of York together with all stock crops furniture and other goods and chattels and personal property thereon for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they my said daughters in the meantime to have all the rents and profits therefrom.

"6. I desire my said trustees to sell my east part of the west half of lot one in the third concession east of Yonge street in the township of York giving my son Michael Meagher the first right of purchase and to divide the proceeds thereof between my sons Michael Meagher and James Meagher in equal proportions.

"7. I direct that no part of my real estate shall be mortgaged.

"8. All the rest and residue of my estate I desire my trustees to sell and convert into cash and divide the proceeds in equal shares among themselves and all my other children.

"9. In dealing with my estate I desire my said trustees to be guided by the advice of Emerson Coatsworth of Toronto one of His Majesty's counsel.

"10. I appoint my said trustees the executrices of this my will hereby revoking all former wills.

"In witness whereof I have hereunto set my hand this twenty-seventh day of December A.D. 1910."

It is settled law that where property is devised or bequeathed upon trust, and the trustee is empowered or directed to dispose of it as he may deem best, without the object of the trust being further defined, the trust is void for uncertainty, and the trustee does not take beneficially; and it is argued for the appellant that that is the case here unless the word "otherwise" is used with reference to the time, and not the objects, of the disposition which is directed to be made, and that if it is to be so read the trust is for the benefit of all the children in equal shares.

Two other views as to the meaning of the clause are suggested: the one, that adopted by the learned trial Judge; and the other, that the disposition of the corpus of the property is to be made by the two daughters, not as trustees, but in their personal capacity, as they may decide, and that they are tenants for life with a general power of appointment over the corpus.

In my opinion, the appellant's contention is not entitled to prevail.

The whole of the testator's property is, no doubt, vested in the two daughters upon trust, but the purpose of the fifth clause is to designate the persons who are to take beneficially the property mentioned in it, and what the clause says is that the trust is "to hold . . . for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they my said daughters in the meantime to have all the rents and profits therefrom."

If the clause had ended with the names of the daughters, it would of course be clear that they took the whole beneficial interest in the property, and the words which follow may mean either that the two daughters, individually and not as trustees, are to make the disposition, or that the trustees are to make it in accordance with the directions of the two daughters as individuals and not as trustees.

The daughters are to have the property for themselves and to make such disposition of it from time to time among the children of the testator or otherwise as they may decide to make;

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and the former is, I think, the meaning of this provision; but it is immaterial which of these two views is the correct one, for in either case the disposition is to be made in accordance with the directions of the two daughters.

It is important to observe that there is a gift of the beneficial interest in the property to the two daughters. The trustees are "to hold" it "for my said daughters Mary Ann and Margaret Ellen Meagher," and the purpose for which the testator says they are to have it is "for themselves and to make such disposition . . .;" and in this respect the case differs from *Yeap Cheah Neo v. Ong Cheng Neo*, L.R. 6 P.C. 381, in which it was said by Sir Montague E. Smith (p. 390): "In trying to reach its meaning" (i.e., the meaning of the clause of the will disposing of the residue), "it is to be observed that it contains no words of gift, but directions to the executors, and that they are mentioned by that title, and not by name. The first direction is to collect and receive the residue; the next, 'that they, their heirs, successors, representatives, or descendants, may apply and distribute the same (all circumstances duly considered) in such manner and to such parties as to them may appear just.' These are neither usual nor apt words of absolute gift; on the contrary, they indicate an intention to impose a trust to distribute the funds among persons other than, or at all events, in addition to, themselves."

And again at p. 392: "Several cases were cited in the argument, in which various forms of expression, conferring unlimited and unconditional powers of disposition, were held to amount to absolute gifts. It is unnecessary, however, to discuss these decisions, or to consider what would be the proper construction of the discretionary power in this will if it had been coupled with plain words of gift, uncontrolled by other parts of the will. Their Lordships' decision, founded on the whole will, is, that a trust was intended to be created, which has failed for want of adequate expression of it."

In my opinion, no trust as to the disposition of the beneficial interest in the corpus of the property is created. If it had been intended to create a trust, one would have expected very differ-

ent language to have been used. It will be observed that it is not the trustees, but the testator's two daughters *nominatim*, who are to make the disposition, and it is they and not the trustees who are to decide as to the disposition which is to be made. Where anything is to be done by the two daughters in their capacity of trustees, it is so stated. In clause 6, dealing with a farm owned by the testator which he intends shall be sold and the proceeds of it divided in equal proportions between his sons Michael and James, the persons who are to sell and divide the property are "my said trustees." So in clause 8 it is "my trustees" that he desires shall sell and convert into cash and divide the proceeds of the rest and residue of his estate, and so also in clauses 9 and 10.

If it were not for the provision as to the two daughters being entitled to the rents and profits until the disposition should be made, I should have agreed with the learned trial Judge that the two daughters take beneficially and absolutely, but that provision is, I think, inconsistent with an intention that they should so take; and my opinion is that the two daughters take beneficially for life, with a general power of appointment over the corpus. There is not much difference in the result between the two views, because, if my view is correct, the two daughters may make an appointment in their own favour and so become entitled to the whole property. The power to appoint cannot be read as a power to appoint only among the children of the testator. The words "or otherwise," while they may refer to the time of making the disposition, also include the objects of the gift.

The meaning of the testator in this case, as of testators in all cases, must be gathered from the whole will, and one of the reasons for the decision in *Yeap Cheah Neo v. Ong Cheng Neo* was that it was evident from the whole will that it was not the intention of the testatrix to give an indefinite and unlimited power of disposition, but that her intention was to create a trust to carry into effect the purpose she had of benefiting two families, and that that was "apparent both from the general frame of the will and its particular provisions" (p. 391).

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*Gibbs v. Rumsey* (1813), 2 V. & B. 294, was distinguished upon the ground that there was there a clear gift of the residue, introduced by the apt words "I give and bequeath," to the trustees and executors, whose names were given in a parenthesis, with absolute power of disposition, and without any indication of the families or persons whom the testatrix desired to benefit.

It may be said that the testator in the case at bar desired to benefit his children, and that according to the Privy Council case that prevents the two daughters from taking beneficially, but I do not understand that such a reference as the testator makes to his children is such an indication of a desire to benefit them as to bring the case within the principle of that decision. In that case the power to apply and distribute was "(all the circumstances duly considered) in such manner and to such parties as to them may appear just," and what was really decided was that, as the testatrix had indicated in the opening part of her will whom she intended to benefit, the words "to such parties" meant to such parties as the testatrix had indicated her intention to benefit. In this case the testator expressly authorises the disposition to be made among his children "or otherwise."

*Gibbs v. Rumsey* has been observed upon in *Ellis v. Selby* (1836), 1 My. & Cr. 286, and in *Buckle v. Bristow* (1864), 10 Jur. N.S. 1095; and it is said in *Jarman on Wills*, 6th ed., p. 902, that it was at one time supposed that if the property was not expressly given in trust, the donees took beneficially, mentioning *Gibbs v. Rumsey* as a case in which that was the view taken, but that distinction has been disapproved—citing *Buckle v. Bristow*, *Yeap Cheah Neo. v. Ong Cheng Neo*, and *Fenton v. Nevin* (1893), 31 L.R. Ir. 478, in support of the statement in the text.

While that may be the case, *Gibbs v. Rumsey* has not been overruled, and it may be observed that nothing was said, in any one of the three cases referred to, to indicate that the fact that the gift is to the trustees not by that title but *nominatim* is not a circumstance properly to be considered in determining whether the intention is to create a trust.

For the reasons I have already given, the case at bar is a

stronger case for holding that the two daughters take beneficially than was *Gibbs v. Rumsey* for holding that the wife in that case so took.

Referring to a contention that a father to whom the trustees of the will were directed to pay dividends "during his life, nevertheless to be by him applied for or towards the maintenance education or benefit" of the children of his wife, took the dividends upon a trust to apply them for those purposes, the Master of the Rolls said, in *Byne v. Blackburn* (1858), 26 Beav. 41, 44: "In this case, the testator himself appointed trustees of the fund, and he therefore could not have intended the father to act as a sub-trustee, and if he intended the children to have a direct and positive interest in the fund during the life of their father, he would have directed his own trustees to make the payment to the children. But he positively directs the payment to be made to the father."

Applying these observations to the case at bar, if the testator had intended that his trustee should make the disposition of the property mentioned in clause 5, he would not have directed it to be made by the two daughters *nominatim* but by his trustees.

Besides this, even if the disposition had been required to be made by the trustees, they were to make it as the two daughters, as beneficiaries and not as trustees, should decide that it should be made, and the trust would have been to hold the property for the persons to whom the trustees should direct that the disposition should be made. It cannot be doubted that, if the trustees had been directed to make such disposition of it as the testator's son Thomas should direct, the son Thomas would have had power to appoint as he might choose, and no trust would have been created, and I do not see why there should be a different result in this case merely because the trustees are the same persons who were to decide as to the disposition to be made, not as trustees but in their personal capacity, and as a right conferred upon them in addition to the interest in the property which they were to take.

If, as I think, the two daughters are given a power to make such disposition among the testator's children or otherwise as

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they may think fit, the power is a general one, and may be exercised by appointing to themselves: Farwell on Powers, 2nd ed., p. 8.

For these reasons, I would vary the judgment of the learned trial Judge by substituting for the declaration which it contains as to the true construction of clause 5 a declaration that the respondents Mary Ann Meagher and Margaret Ellen Meagher are entitled beneficially to an estate for the lives of themselves and the survivor of them in the property mentioned in clause 5, with a general power of appointment over the corpus giving them the right to appoint either to themselves or to any other person as they may think fit.

In other respects the judgment should be affirmed and the appeal dismissed, and the appellant should pay the costs of the appeal.

*Judgment below varied.*

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[APPELLATE DIVISION.]

Feb. 12.  
April 26.

DOYLE V. FOLEY-O'BRIEN LIMITED.

*Mines and Minerals—Injury to Miner—Explosion of Charge in Drilled Hole Left Unexploded—Statutory Duty of Mine-owner — Mining Act of Ontario. R.S.O. 1914. ch. 32, sec. 164, rules 14, 15, 40, 98—Neglect to Report Missing Hole—Master and Servant—Defective System—Evidence—Trial—Refusal of Adjournment—Discretion—Expert Testimony—Cause of Injury—Contributory Negligence—Damages.*

In the defendants' mine two shifts of men were employed, one by day and one by night. There was no foreman or overseer or other person in charge to whom the report called for by rule 14 of sec. 164 of the Mining Act of Ontario, R.S.O. 1914, ch. 32, in the case of an unexploded hole, could be made. A blackboard upon which to write such a report had been provided, but no chalk. When the night shift left the mine on a Saturday night at 12 o'clock, they left unexploded one hole that had been charged with dynamite. They made no report to any one. The plaintiff, without having received any warning, went to work in the mine on the following Monday, and, while engaged in his ordinary work, struck a protruding ledge of rock—an explosion followed, and he was injured:—

*Held*, in an action to recover damages for his injuries, that the failure of the defendants to observe the statutory rules (see rules 14, 15, 40, and 98 of sec. 164) was negligence, and was the cause of the plaintiff's injuries. (2) That the Judge at the trial exercised a proper discretion in refusing to adjourn the trial in order to enable the defendants to obtain the evidence of experts as to the action of dynamite—the object of such evidence being to shew that the plaintiff's injuries could not have been caused by an unexploded hole; and the inference from the testimony

given at the trial was that the injuries were caused by contact with an unexploded hole, and not with loose powder in the muck, as was contended by the defendants.

(3) That there was no evidence of negligence on the plaintiff's part.

(4) That \$5,200, the sum assessed by the trial Judge as damages for the plaintiff's injuries, was not excessive.

Judgment of CLUTE, J., affirmed.

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ACTION by a workman employed by the defendants in their mine to recover damages for injuries sustained by him owing to the negligence of the defendants, as he alleged.

January 14 and 15. The action was tried by CLUTE, J., without a jury, at Toronto.

*F. J. Foley*, for the plaintiff.

*H. E. Rose*, K.C., for the defendants.

February 12. CLUTE, J.:—The plaintiff's action is to recover damages for injuries received by him while in the employ of the defendants in their mine. His work was that of assisting the driller. On the preceding Saturday—the accident having occurred on Monday the 16th November—he had worked in the mine in the forenoon, but not in the afternoon or evening. When the night shift went off on Saturday night at 12 o'clock, they had intended to fire the holes that had been charged. Counting those fired, it appeared that there was one missing. A black-board was provided upon which the driller wrote a notice, stating the fact when a hole had missed fire, in order that the men of the incoming shift might know that there was a charged hole that had not exploded. On this occasion this precaution was not taken. It is said that there was no chalk with which to write down the notice. The evidence is that the driller said it would make no difference because he would return to this particular work himself. For some reason he did not do so. The plaintiff took the next shift. There was thus a hole left charged that had not been fired; and the plaintiff, while discharging his ordinary work in clearing away the refuse—muck, as it is called—from the face of the drift, struck a small ledge of rock that protruded by the side, and there was an immediate explosion, which caused the injuries complained of.

The plaintiff claims that this was owing to the neglect of

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duty on the part of the mine-owners in not advising him that there was an unfired hole, and that there was negligence in the system, in this regard, of carrying on the work in the mine by the defendants.

The Mining Act of Ontario, R.S.O. 1914, ch. 32, has provisions to guard against an accident of this kind. Section 164, rule 40, provides that the manager or captain or other competent officer of every mine shall examine at least once every day all working shafts, levels, stopes, tunnels, drifts, crosscuts, raises, signal apparatus, pulleys and timbering, in order to ascertain that they are in a safe and efficient working condition, and he shall inspect and scale, or cause to be inspected and scaled, the walls and roofs of all stopes or other working places at least once every week. No attempt was made to comply with this rule, nor was it in fact complied with.

Rule 14 provides that, when a miner fires a round of holes, he shall count the number of the shots exploding. If there are any reports missing, he shall report the same to the mine captain or shift boss. If a missed hole has not been fired at the end of a shift, that fact, together with the position of the hole, shall be reported to the mine captain or shift boss in charge of the next relay of miners, before work is commenced by them. Here there was no mine captain or shift boss, and on the occasion in question no report was made to any one; nor was there any system established in the mine to carry out the provisions of this rule.

Rule 15 provides that a charge which has missed fire shall not be withdrawn, but shall be blasted, and no drilling shall be done in the working place where there is a missed hole or cut-off hole containing explosive until it has been blasted. There was no attempt here to comply with this rule, nor any mine captain or shift boss to see that it was carried out.

So far as the evidence discloses, there was no reasonable effort made on the part of the company to give effect to this provision of the statute, the disregard of which was the immediate and proximate cause of the accident.

Rule 98 of the same section provides that there shall always be enforced and observed by the owner and the agent of a mine, and by every manager, superintendent, contractor, foreman,

workman, and other person engaged in or about the mine, such care and precaution for the avoidance of accident or injury to any person in or about the mine as the particular circumstances of the case require; and the machinery, plant, appliances and equipment and the manner of carrying on operations shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety.

See *Danis v. Hudson Bay Mines Limited* (1914), 32 O.L.R. 335, where it was held that under the Mining Act the duty of seeing that the provisions of the Act in its application to mining be carried out is imposed upon the mine-owners, as well as upon others.

In the present case, as in the case referred to, there was no official mine captain or boss; there was no superintendent or shift boss. There was neglect on the occasion in question to provide against the danger expressly guarded against by the statute; and I find that there was negligence on the part of the defendants in this regard and in the system carried on by them in the working of the mine.

It was suggested that the plaintiff might not have been injured from the explosion of an undischarged hole. I find as a fact that he was. About this, I think, there is no doubt. The plaintiff struck a projecting ledge from the top, and immediately when struck the explosion took place. He knew where it came from. What seems to have happened—which, it is said, is not unusual—is this. The stick of explosive was cut in two, the part remaining in the rock did not explode, the remainder did explode, but not so as to ignite the cap, which was afterwards found intact. I find that the plaintiff took reasonable care upon his part, and was not guilty of contributory negligence. He had no reason to suspect that there was an undischarged hole, because there was no notice given to him to that effect. He was sent to where he was working, and was in the discharge of his duty at the time of the explosion.

The plaintiff is entitled to recover.

The injuries that he received were very serious. For a time he lost the sight of both eyes. By degrees he partially recovered the sight in the left eye. The right eye, after a time, began to

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affect the left. It was useless and dangerous, and was removed. The plaintiff has not yet recovered fully the use of the remaining eye. He has attempted on several occasions to do work at which he was employed at the time of the accident or similar work, but has been unable to continue it, and the evidence is that he never will be able to do that kind of work. There is danger of his losing the remaining eye, but the probability, according to medical expert evidence, is that he will not lose it. The defendants paid part of the plaintiff's expenses, namely, the expenses while he was in the hospital, but not the fees of the doctor who removed the eye. After making all just allowances, I assess the damages at \$5,200. The regular wages for the kind of work which was being done by the plaintiff in that locality where he worked was from \$3 to \$3.50 per day. If he were not entitled to recover at common law, as, in my opinion, he is, he would be entitled under the statute to three years' earnings, which I fix at \$1,000 a year, in all \$3,000.

The plaintiff is entitled to judgment for \$5,200 and costs of the action.

The defendants appealed from the judgment of CLUTE, J.

March 31 and April 1. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*H. E. Rose, K.C.*, and *G. H. Sedgewick*, for the defendants, contended that an adjournment asked for by the defendants at the trial for the purpose of obtaining the evidence of experts as to the action of dynamite should not have been refused, as it was by the trial Judge; and that there should be a new trial. They also contended that, upon the evidence, the plaintiff's injuries could not have been caused by striking an unexploded hole, but was caused by striking loose powder for which the defendants were not responsible. They further contended that the finding of negligence was not supported by the evidence; that the plaintiff was guilty of contributory negligence; and that the damages assessed were excessive. Reference was made to the *Danis* case, cited by the trial Judge, pointing out distinctions.

*F. J. Foley*, for the plaintiff, respondent, *contra*, referred to

*Dementitch v. North Dome Mining Co.* (1913), 5 O.W.N. 932,  
and *Musumicci v. North Dome Mining Co.* (1914), 7 O.W.N. 48.

April 26. The judgment of the Court was delivered by GARROW, J.A.—Appeal by the defendants from the judgment of Clute, J., at the trial before him without a jury, in favour of the plaintiff.

The action was brought by the plaintiff, a workman in the service of the defendants, to recover damages alleged to have been sustained by him owing to the negligence of the defendants.

As will be seen, the learned Judge found that negligence on the part of the defendants, in a failure to follow the provisions of the Mining Act and the rules therein contained for the safety of the miner, had been established; and with that conclusion I agree.

There were apparently two shifts of men employed, a day and a night; and in each shift there were four men in addition to the engineer. There was no foreman or overseer or other person in charge to whom the report called for by rule 14 of sec. 164 of the Mining Act in the case of an unexploded hole could be made. A blackboard to contain such a report had, however, been recently installed, but no chalk with which to write the report had been supplied, with the result that there was no notification of the unexploded hole by the shift going off work after the blast on Saturday night to the succeeding shift, as the statute clearly intends there shall be. The excuse offered is that the staff of operatives was so small as not to require such officers as a mine captain and shift bosses—which is an excuse perhaps, but not, in my opinion, an answer. The Act does not prescribe a minimum of employees; the mine-owner may employ as many or as few as he pleases; but, whether he employs many or few, he must carry on his operations in conformity with the provisions of the Act designed for the safety of the miner, which are as applicable to the case of four employees as of four hundred. The essential thing to be accomplished is to give to the incoming shift due warning of the danger from unexploded holes, and the giving of such warning cannot be avoided by a failure to appoint the officers through whom, under the rules, such warn-

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ing is intended to be given. If there are no such officers, then other provision for giving the necessary warning must be made in order that the provision of the Act may, at least substantially, be complied with. Here, as the evidence shews, the warning would have been effectually given if placed upon the blackboard, which would have been done if the necessary chalk had been supplied, a trifling, but as it turns out an all-important, omission.

On the argument before us, counsel for the defendants, in addition to contesting the defendants' negligence in failing to give warning, also contended: (1) that the adjournment asked for at the trial should have been granted; (2) the evidence discloses that the plaintiff's injury could not have been caused by striking an unexploded hole, but was caused by striking loose powder, for which the defendants were not responsible; (3) the plaintiff was guilty of contributory negligence; and (4) the damages are excessive.

The adjournment asked for was, as stated by counsel at the trial, for the purpose of obtaining the evidence of experts as to the action of dynamite; and the reason given for not having come to trial prepared with such evidence was because the defendants had not observed or become aware until the trial that the unexploded hole was found after the explosion which injured the plaintiff still to contain a quantity of unexploded powder—a circumstance which, it was argued, was entirely inconsistent with the plaintiff's contention.

Clute, J., dealt with the application to adjourn, which was only made at the close of the plaintiff's case, thus: "I think it would be wholly unfair to enlarge this case. Your clients do not seem to have taken sufficient interest in it even to attend. The accident occurred on the 16th November, 1913. The writ was issued in May, 1914. There was discovery by examination of the plaintiff; and, remembering that your clients have the control of the premises, and knew or ought to have known the cause of the accident so far as it could be ascertained, it is too late now to ask the Court to adjourn the case on the possibility of something turning up that might be favourable to your clients." Under the circumstances thus stated by the learned Judge, it appears to me that he exercised a wise discretion in refusing the application, with which we ought not to interfere.

The expert evidence, to obtain which the adjournment was asked, was, of course, intended to bear upon the second objection; but, even without such evidence, the learned counsel for the defendants contended with great earnestness that, upon the evidence which was given, the accident could not have happened as described by the plaintiff. The point of his contention was apparently that the explosion would, in the ordinary course, have consumed the whole of the explosive. Such a contention, however, implies a constancy in the action of the explosive, dynamite, which was being used, which is not consistent with the evidence. There is not very much of it, it is true, and none of it what might be called strictly "expert," but it is the evidence of working men of actual experience in the work of mining, and none the less valuable because of that. Campbell, the deckman, said that the usual mode of exploding in such situations, and the one followed in the present instance, was by means of a cap and fuse connected with the hole containing the explosive, which, when everything is ready, is lit; and that he had often seen partial explosions, and powder left in the hole. A similar statement was made by Carey, a mucker, who added that he had found whole sticks of unexploded dynamite among the muck after a blast.

Immediately after the plaintiff had been injured, the hole was examined by both Campbell and Carey. They both agree that there had been a partial explosion either on the occasion when the plaintiff was injured or prior thereto. Ten holes in all had been drilled and filled with explosive, and the blast set off on Saturday night, and only nine explosions were heard. That is not disputed. When then on the evidence did the partial explosion of the remaining hole where the plaintiff was working take place? This seems to be the vital question upon this branch of the case; and the matter seems to me to be really determined in the plaintiff's favour by the evidence of Geroux, also a mucker, who says that, after the plaintiff's injury, he found a part of a fuse and an *unexploded* cap in the immediate vicinity of the hole in question. Its presence there is wholly unaccounted for unless it is that in some way it had become unattached or was originally insufficiently attached to the hole in question which

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it was intended to explode, thus accounting for the missing explosion on Saturday night. And, if there was no explosion then—which seems to be established—certainly none subsequently, but prior to the plaintiff's injury, is shewn, with the result that the inference is strong—satisfactorily strong, it seems to me—that it was with that hole, and not with loose powder in the muck, that the plaintiff came in contact on the occasion in question, and that this partial explosion which the witnesses describe was the result of such contact.

Not much need be said upon the third question. The only negligence on the plaintiff's part suggested by counsel really is that he did not see the hole and that it was unexploded. This takes little account of the surroundings, it seems to me. The explosion of Saturday night had left the floor covered deep with *débris*, or muck, as it is called. The only light in the drift was derived from three or four candles. Assuming that every one was doing as the plaintiff was—his duty—he had no reason to apprehend the danger which overtook him. He had looked at the blackboard before descending, and had found all clear there. He did not actually see the hole. It may have been, and indeed probably was, covered over with the dust or small *débris* of the Saturday's explosion. Altogether, the circumstances do not suggest to me any evidence of negligence on the plaintiff's part.

Nor does the question of the amount of damages call for lengthened remark. The plaintiff is a young man, 29 years of age. He was earning a good wage, and had his life practically all before him. As the result of this injury, caused by the defendants' negligence, he has been put to expense and made to suffer much pain, has lost one eye and had the sight of the other impaired. His career is thus practically ended, for there are not many satisfactory occupations open to one so handicapped. All things considered, I am not at all convinced that the amount awarded, while liberal, perhaps, as verdicts go, is excessive.

For these reasons, I would dismiss the appeal with costs.

*Appeal dismissed.*

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## McCUNE v. GOOD.

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*Vendor and Purchaser—Agreement for Sale of Land—Option in Lease—Acceptance—Absence of Title in Vendor—Knowledge of Purchaser—Failure of Vendor to Repudiate Option—Damages—Expenses of Searching Title—Nominal Damages—Costs.*

A married woman owned land; her husband executed a lease of it in favour of the plaintiff; the lease contained an option of purchase; the plaintiff knew, before the execution of the lease, that the wife owned the land; he accepted the option, and sued both husband and wife for specific performance or damages. The evidence did not shew satisfactorily how the option came to be in the lease; but the husband knew about it afterwards and did not repudiate it. The wife refused to recognise it, and as against her the action was dismissed:—

*Held*, that the acceptance was the formal completion of a contract with the knowledge that it was completely nugatory so far as the property was concerned; and the plaintiff's utmost right was only to the damages which would naturally flow from a breach of such an agreement, in the contemplation of both parties to it.

In the case of an ordinary sale and purchase agreement, the damages would not include anything in respect of what had occurred after discovery of the defect or absence of title; and in this case there was no right to recover even the ordinary damages, the expense of searching the title, if any search was made; but nominal damages were recoverable, because the husband left the option standing after he knew that it was in the lease, and neither repudiated its insertion nor attempted to withdraw it.

Review of the authorities.

*Ontario Asphalt Block Co. v. Montreuil* (1913), 29 O.L.R. 534, *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, and *Pounsett v. Fuller* (1856), 17 C.B. 660, specially referred to.

The judgment of BRITTON, J., at the trial, in so far as it dismissed the action against the husband, was reversed upon the plaintiff's appeal, and judgment was given for the plaintiff against the husband for \$5 damages and \$25 costs of an action for nominal damages.

APPEAL by the plaintiff from the judgment of BRITTON, J., after trial of the action and counterclaim without a jury, dismissing the action with costs to the defendant Mary Good and without costs to the defendant James Good, and awarding the defendant Mary Good judgment for \$500 on her counterclaim, with costs.

The action was for specific performance of an agreement for the sale of land in the city of Toronto to the plaintiff, or for damages; and the counterclaim was for occupation rent.

April 16. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

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*W. A. Henderson*, for the appellant, abandoned any claim against the defendant Mary Good, but argued that the plaintiff was entitled to substantial damages against the defendant James Good for the loss of an advantageous contract. After James Good became aware that there was an option in the lease, he did not repudiate it: *Vallier v. Walsh* (1857), 6 U.C.C.P. 459.

*G. W. Holmes*, for the defendant James Good, respondent, contended that he was not liable in damages, because both parties knew, when the contract was made, that he did not own the property, and that he had no right to get the title. He had always been willing that the option should be carried out by his wife. Reference to *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, at p. 207; *Ontario Asphalt Block Co. v. Montreuil* (1913), 29 O.L.R. 534; *McNiven v. Pigott* (1914-5), 31 O.L.R. 365, 33 O.L.R. 78; Fry on Specific Performance, 5th ed., p. 642; *In re Jackson and Haden's Contract*, [1906] 1 Ch. 412, at p. 421; *Scott v. Reikie* (1865), 15 U.C.C.P. 200; *Morgan v. Russell & Sons*, [1909] 1 K.B. 357.

*G. C. Campbell*, for the defendant Mary Good.  
*Henderson*, in reply.

April 26. The judgment of the Court was delivered by HODGINS, J.A.:—The appellant could not succeed against the respondent Mary Good, and practically abandoned his appeal as to her on the hearing. It will, therefore, be dismissed with costs.

As regards the respondent James Good, the contention is, that he is liable for substantial damages owing to loss of a bargain or at all events for some damages.

The appellant at the trial admitted, both personally and by his counsel, that, before the lease was signed, he knew that the respondent Mary Good owned the property. The evidence is not satisfactory as to how the option came to be in the lease, and it so struck the learned trial Judge. But enough appears to shew that the respondent James Good knew about it afterwards, and it was not repudiated by him. Indeed, his present attitude is, that he is quite willing that the option should be carried out by his wife. She, however, refuses, and has done so all along.

The respondent James Good has broken his contract; and the question is, what damages flow from that breach in favour of the appellant?

The general rule was considered by this Divisional Court in *Ontario Asphalt Block Co. v. Montreuil*, 29 O.L.R. 534, and is thus stated at pp. 545, 546: "If the inability of the vendor to perform his contract is due to want of title or a defect in title, the rule is that the damages recoverable for the breach of contract are limited to the expenses the purchaser has incurred. This rule is without exception, and applies even where the vendor enters into the contract knowing that he has no title to the land nor any means of obtaining it, though in that case the purchaser may have a remedy by action of deceit: *Bain v. Fothergill*, L.R. 7 H.L. 158."

It is true that in some cases this rule is not applied, as where the vendor has wilfully omitted to do some act necessary to complete the contract, or has done something to prevent its performance; but these cases are referable to the principle that no one is allowed to take advantage of his own wrong, rather than to the general rule as exceptions thereto.

Both parties contracted with the knowledge that the respondent James Good lacked the ownership necessary to complete the transaction, and that he had no right to get the title. In other words, both knew that the option was valueless when given, and that, if accepted before any change had occurred which would vest the property in James Good, it could not be carried out.

The acceptance, therefore, was the formal completion of a contract with the knowledge that it was completely nugatory so far as the property was concerned—giving at most a right only to those damages which would naturally flow from a breach of such an agreement, in the contemplation of both of the parties to it.

Although in *Robinson v. Harman* (1848), 1 Ex. 850, evidence that the purchaser knew when he entered into the bargain that the vendor had no title was rejected by Lord Denman, C.J., on the ground that it was inconsistent therewith, the defendant having pleaded admitting the contract, and the rejection was upheld by the Court of Exchequer, yet the decision in

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*Bain v. Fothergill* appears to protect vendors in all cases of want of title: *Rowe v. School Board for London* (1887), 36 Ch.D. 619, 625; *Morgan v. Russell & Sons*, [1909] 1 K.B. 357. The evidence, whether admissible or not (see *In re Jackson and Haden's Contract*, [1906] 1 Ch. 412, 425), would certainly be received in an action for deceit: *Gray v. Fowler* (1873), L.R. 8 Ex. 249, 282.

In an ordinary sale and purchase agreement, the damages would not include anything in respect of what had occurred after discovery of the defect or absence of title: *Mayne on Damages*, 8th ed., p. 240; *Pounsett v. Fuller* (1856), 17 C.B. 660.

Applying that rule, there would seem to be no right to recover even the ordinary damages such as the expenses incurred by the purchaser in searching the title etc.—much less damages for loss of profit on a resale. There is no definite evidence that the title was ever really searched; and the letter of the appellant's solicitor of the 4th February, 1914 (exhibit 6), shews that whatever was done in that direction took place in advance of the acceptance of the option on the 11th April, 1914.

In either view, therefore, those expenses are not recoverable. But nominal damages may, I think, be recovered, because the respondent James Good left the option standing after he knew it was in the lease, and neither repudiated its insertion nor attempted to withdraw it. The other party had the right to sue for breach of contract after acceptance. But I cannot think that those damages should carry the whole costs of the action for specific performance against this respondent, which the appellant must have known was bound to fail. It is perhaps reasonable to allow the appeal as against the respondent James Good to the extent of substituting for the judgment appealed against, one giving him \$5 damages and \$25 costs of an action for nominal damages, which would probably not have been contested. The circumstances do not warrant imposing any further payment on this respondent for the costs of the appeal.

*Appeal allowed in part.*

## [APPELLATE DIVISION.]

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April 26.

RE OTTAWA AND NEW YORK R.W. CO. AND TOWNSHIP OF  
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*Assessment and Taxes—Railway Bridge Spanning Navigable River—Ownership of Soil of Bed of River in Crown—Statutory Authority for Erection of Bridge—Grant of Soil—"Structure on Railway Lands"—Exemption from Assessment—Assessment Act, R.S.O. 1914, ch. 195, sec. 47, sub-sec. 3.*

That part of the New York and Ottawa Railway Company's bridge over the river St. Lawrence which is within the township of Cornwall was held to be a "structure on railway lands" within the meaning of sub-sec. 3 of sec. 47 of the Assessment Act, R.S.O. 1914, ch. 195, and therefore not assessable by the township municipality.

The erection and maintenance of the bridge having been authorised by Act of the Parliament of Canada, and the Crown being the owner of the soil and freehold of the bed of the river and of the islands therein—the ownership extending *usque ad cælum*—a grant of the right to construct and maintain the bridge was a grant of the part of the soil occupied by it; and, therefore, the railway company was the owner of so much of the soil as was occupied by the superstructure as well as by the piers; and so the bridge was a "structure on railway lands."

Decision of the Ontario Railway and Municipal Board reversed.

APPEAL by the Ottawa and New York Railway Company, the New York and Ottawa Railway Company, and the New York Central Lines, from an order of the Ontario Railway and Municipal Board, dated the 7th October, 1914, confirming the assessment of a part of the appellants' bridge over the river St. Lawrence lying within the township of Cornwall.

The question which arose upon the appeal was, whether the bridge was liable to assessment under the Assessment Act, R.S.O. 1914, ch. 195.

December 4, 1914. The appeal was heard by MEREDITH, C.J.O., CLUTE, RIDDELL, and SUTHERLAND, JJ.

*W. L. Scott*, for the appellants. The bridge is a superstructure, and as such comes under R.S.O. 1914, ch. 195, sec. 47, sub-sec. 2 (c), or under sub-sec. 3. It crosses a river, which is a public highway; but, as the railway company has an easement over this highway, the bridge must be treated as railway property: *Niagara Falls Park and River R.W. Co. v. Town of Niagara* (1899), 31 O.R.

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29; *Belleville and Prince Edward Bridge Co. v. Township of Ameliasburg* (1907), 15 O.L.R. 174; *Central Vermont R.W. Co. v. Town of St. Johns* (1887), 14 S.C.R. 288; *Town of St. Johns v. Central Vermont R.W. Co.* (1889), 14 App. Cas. 590. Whatever our title is, we come under sec. 47, sub-secs. 1(a) and 2(a). On the question of the bridge being real property, see *Niagara Falls Suspension Bridge Co. v. Gardner* (1869), 29 U.C.R. 194. On the question of it being a public highway, see "Words and Phrases Judicially Defined," vol. 4, p. 3292; *Bouvier's Law Dictionary*, vol. 1, p. 94; *Kent's Commentaries* (1889), vol. 3, p. 432; *Pratt & Mackenzie's Law of Highways*, 15th ed., p. 4; *Eastern Counties R.W. Co. v. Dorling* (1859), 5 C.B.N.S. 821; *Smith's Leading Cases*, 9th ed., p. 181.

*G. I. Gogo*, for the Corporation of the Township of Cornwall, respondent. A bridge such as this was held assessable under the "scrap iron" cases, of which the latest is *In re Queenston Heights Bridge Assessment* (1901), 1 O.L.R. 114. The law was then changed by the Assessment Amendment Act, 1902, 2 Edw. VII. ch. 31, sec. 1 (see sub-sec. 5 of the new sec. 18), and later by the revised Assessment Act, 4 Edw. VII. ch. 23, secs. 43, 44. *International Bridge Co. v. Village of Bridgeburg* (1906), 12 O.L.R. 314, though decided on other grounds, may be referred to for the *obiter dicta* of Moss, C.J.O., at pp. 317, 318. The case falls within sec. 47, sub-sec. 1 (d), for the lands are not owned in fee by the company; they have merely an easement over them, and sub-sec. 3 will not apply. The river St. Lawrence is not a highway within the meaning of sub-sec. 2(c), in which section the word is used as meaning a road in a narrow sense—not a highway in the sense in which the ocean is a highway.

*Grayson Smith*, on the same side, referred to sec. 46, dealing with international bridges, and argued by analogy that the intention of the Legislature was to tax all bridges in the same manner.

*Scott*, in reply.

April 26. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the Ottawa and New

York Railway Company, the New York and Ottawa Railway Company, and the New York Central Lines, from an order of the Ontario Railway and Municipal Board dated the 7th October, 1914, confirming the assessment of that part of the company's bridge over the river St. Lawrence which is within the township of Cornwall.

The question for decision is as to the liability to assessment under the Assessment Act, R.S.O. 1914, ch. 195, of this bridge. It was built by the Ottawa and New York Railway Company, which was incorporated by an Act of the Parliament of Canada. The part of it which lies within the State of New York was built by an American corporation, the Cornwall Bridge Company; and, in order that the two sections of it might be operated uniformly, the whole of the bridge is leased to a holding company incorporated in the United States, the New York and Ottawa Bridge Company.

The section of the Assessment Act which deals with the assessment of railways is sec. 47.

By sub-sec. 1, every steam railway company is required to transmit annually to the clerk of every municipality in which any part of the roadway or other real property of the company is situate a statement shewing:—

“(a) The quantity of land occupied by the roadway, and the actual value thereof (according to the average value of land in the locality) as rated on the assessment roll of the previous year;

“(b) The vacant land not in actual use by the company and the value thereof.

“(c) The quantity of land occupied by the railway and being part of the highway, street, road or other public land (but not being a highway, street or road which is merely crossed by the line of railway) and assessable value as hereinafter mentioned of all the property belonging to or used by the company upon, in, over, under, or affixed to the same.

“(d) The real property, other than aforesaid, in actual use and occupation by the company, and its assessable value as hereinafter mentioned.”

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Sub-section 2 provides that the assessor shall assess the land and property mentioned in sub-sec. 1 as follows:—

“(a) The roadway or right of way at the actual value thereof according to the average value of land in the locality; but not including the structures, substructures, and superstructures, rails, ties, poles and other property thereon;

“(b) The said vacant land, at its value as other vacant lands are assessed under this Act;

“(c) The structures, substructures, superstructures, rails, ties, poles and other property belonging to or used by the company (not including rolling stock and not including tunnels or bridges, in, over, under or forming part of any highway), upon, in, over, under or affixed to any highway, street or road (not being a highway, street or road merely crossed by the line of railway) at their actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises, regard being had to all circumstances adversely affecting the value including the non-user of such property; and

“(d) The real property not designated in clauses (a), (b) and (c) of this sub-section in actual use and occupation by the company, at its actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises.”

By sub-sec. 3 it is provided that “notwithstanding anything in this Act contained, the structures, substructures, superstructures, rails, ties, poles, wires and other property on railway lands and used exclusively for railway purposes or incidental thereto (except stations, freight sheds, offices, warehouses, elevators, hotels, roundhouses and machine, repair and other shops) shall not be assessed.”

And sub-sec. 5 provides that “a railway company assessed under this section shall be exempt from assessment in any other manner for municipal purposes except for local improvements.”

The view of the Board was that the river St. Lawrence is not a highway within the meaning of sec. 47; and that, as by the interpretation section of the Assessment Act “land” and

"real property" include "buildings, or any part of any building, and all structures, machinery and fixtures, erected or placed upon, in, over, under, or affixed to, land," the bridge is land and real property within the meaning of sec. 47, and does not fall within clauses (a), (b), or (c) of sub-sec. 2, but within clause (d), and is assessable as provided by that clause.

The Board was also of opinion that the bridge is not a structure on railway lands within the meaning of sub-sec. 3, and that, it is said, was admitted by counsel for the appellants.

Upon the argument before us, counsel for the appellants contended that the bridge is on railway lands within the meaning of sub-sec. 3, and that it is also a bridge over a highway, merely crossed by the line of the railway, within the meaning of clause (c) of sub-sec. 2, and is therefore not liable to assessment.

As appears from the plan filed, the bridge on the Canadian side rests upon an abutment built on the railway company's land adjoining the Cornwall canal, which is crossed by a drawbridge. There is then a cantilever span crossing the north channel of the river St. Lawrence, and resting at the south end upon a pier built on Cornwall Island, which is or forms part of an Indian Reserve, and lies between the north and south channels of the river. There are three piers supporting the drawbridge, one at the north end of the canal, another about the centre of it, and the third at its south end. The cantilever span crossing the north channel is supported by two piers built into the bed of the channel, a pier at the southerly end of the channel and the pier at the south end of the canal. The railway is then carried across the island for about the northerly one-third of the distance in a cutting, for the next or middle one-third on practically level ground, and for the southerly one-third on a solid earthen embankment, with one wooden trestle of about thirty feet in length, across a cattle pass, and at the southerly end of the island there is a pier, upon which rests the northerly end of a bridge which is built over the southerly channel of the river.

The erection of the bridge having been authorised by the Parliament of Canada, it must be assumed for the purposes of

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the case that it is a lawful structure, that the railway company is entitled to maintain it as it has been constructed, and that its occupation of the soil by the piers and by the superstructure, in so far as the latter occupies the land of the Crown, is a lawful occupation; and, that assumption being made, the bridge is, in my opinion, a structure on railway lands within the meaning of sub-sec. 3.

The Crown was the owner of the soil and freehold forming the bed of the river St. Lawrence and of the islands; and that it could grant the right to build the piers there, is not open to question; nor is it open to question that, as the ownership of the soil extends upwards to an indefinite extent (*cujus est solum, ejus est usque ad cælum*), a grant of the right to construct and maintain the bridge is a grant of that part of the soil occupied by it; and, therefore, for the reasons already given, the railway company is the owner of so much of the soil as is occupied by the superstructure as well as by the piers; and it follows that the bridge is a structure on railway lands within the meaning of sub-sec. 3.

I cannot doubt that if a railway company, proposing to erect a viaduct for the purpose of carrying its track, instead of acquiring the land out and out, should acquire from the owner of the land only the right to construct the viaduct at a stipulated height above the surface of the land, with the necessary piers to support it, the company would be the owner of the land occupied by the viaduct and the piers, and it would constitute railway lands within the meaning of sub-sec. 3; and I can see no difference in principle between such a case and the acquisition by the railway company of the right to erect the bridge in question, although it is built over a navigable river.

That an upper room not resting directly upon the soil but supported entirely by the surrounding parts of the building may at common law be the subject of a feoffment and livery as a corporeal hereditament, that is to say, as land, is undoubted: Co. Litt. 48; Sheppard's Touchstone, 8th ed., p. 206; 1 Preston on Estates, p. 8. And that the right of the owner to the room may be extinguished by the operation of the Statute of Limitations was decided in *Iredale v. Loudon* (1908), 40 S.C.R. 313.

Just as in the case of *Consumers Gas Co. v. City of Toronto* (1897), 27 S.C.R. 453, and *City of Toronto v. Consumers Gas Co.* (1914), 32 O.L.R. 21, it has been held that the soil beneath the surface which is occupied under statutory authority by the pipes of a gas company is land of the company, so it must be held that that which is occupied above the surface by the superstructure of the bridge, as well as that which is occupied by the piers, is land of the appellant railway company.

It may be that this land, not including the bridge upon it, is assessable under clause (a) of sub-sec. 2 as part of the roadway or right of way, but that it not the way in which it has been assessed; and, if assessable, there are no data for determining at what sum it should be assessed.

The contest throughout has been confined to the single question whether or not the bridge itself is liable to assessment; and as, in my opinion, it is not, the appeal should be allowed and the assessment roll should be amended by striking out the assessment in respect of it.

This conclusion having been come to, it is unnecessary to determine the other question raised by the appellants.

*Appeal allowed.*

[MIDDLETON, J.]

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April 30.

*Trusts and Trustees—Conveyance of Land by Deed Absolute in Form but as Security for Debt—Status of Grantee—Trustee without Power of Sale—Sale by Trustee without Concurrence of Cestui que Trust—Position of Purchasers—Executory Contract of Sale—Right to Call for Conveyance—Superior Equity of Cestui que Trust—Right to Redeem—Payment of Debt—Repayment of Amount Paid by Purchasers—Account—Costs—Claim of Purchasers against Trustee—Damages—Loss of Profits.*

Land was conveyed by the plaintiff's testatrix to the defendant S. by a deed absolute in form, but in reality as security for a debt:—  
*Held*, in an action against S. and the purchasers, that S. held the land as trustee and had no power to sell it without the concurrence of his *cestui que trust*.

*Pearson v. Benson* (1860), 28 Beav. 598, followed.

*Oland v. McNeil* (1902), 32 S.C.R. 23, distinguished.

S. sold the land in good faith, but at a great undervalue; the contract of sale was executory—the land had never been conveyed:—



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*Held*, that the purchasers were not *bonâ fide* purchasers for value from S. so as to preclude the plaintiff from asserting her right: upon payment of the balance of the purchase-money, they would have an equity to compel a conveyance of the property to them; but that equity was subject to the prior equity of the *cestui que trust*. Actual payment of the price is necessary to establish a purchase for value.

*Molony v. Kernan* (1842), 2 Dr. & War. 31, followed.

The plaintiff was *held* entitled to redeem upon payment of the amount due to S.; and the purchasers to be refunded the money paid by them to S.; an accounting was ordered; and special directions as to costs and set-off were given.

The purchasers made a third party claim against the trustee to recover the loss of profit by reason of the increase in the value of the land since they purchased, and upon the ground that he had covenanted to convey:—

*Held*, that these damages were not recoverable.

*McNiven v. Pigott* (1914-5), 33 O.L.R. 78, 335, followed.

ACTION for an account and redemption and to set aside an agreement made by the defendant Sinclair for the sale of land to the defendants Perkins and Toll; and third party claim by the defendants Perkins and Toll against the defendant Sinclair.

April 20. The action and third party claim were tried by MIDDLETON, J., without a jury, at Chatham.

*J. G. Kerr*, for the plaintiff.

*R. L. Brackin*, for the defendants Perkins and Toll.

*O. L. Lewis, K.C.*, for the defendant Sinclair.

April 30. MIDDLETON, J.:—By deed bearing date the 3rd January, 1894, Mary Jane Craford and Philander Craford conveyed certain lands to the defendant Sinclair, by a deed which, though absolute in form, is, it is admitted, intended to be in truth a mortgage or security for debt.

Part of the land covered by this deed was sold, and some controversy arose between the Crafords and Sinclair. This was submitted to arbitration. The submission is not produced, but an award was made dated the 15th October, 1901. By this award it is found that this conveyance was in reality a trust deed held as security for payment of money due by the grantors. An account is then taken between the parties, in which a balance is found due to Sinclair, and the lands then remaining unsold, as well as certain other securities, are directed “to be held by the said Sinclair as security for a repayment to him of the said amount due him, and interest thereon at 6 per cent., and that all

sums received by him . . . on sales of the said lands or any part thereof shall be applied by him upon the amount found due to him as aforesaid."

After the date of this award, sales were made, in each case with the authority and approval of the Craforths. Where their interest in the property was known, they joined in the conveyance. Where the purchaser only knew of Sinclair's apparently absolute title, Sinclair alone conveyed.

In all these transactions the husband was the active party, although the wife was really the owner of the land. Both husband and wife are now dead, and the wife, by her will, left everything to the plaintiff, her daughter.

Sinclair is, I think, an entirely honest and well-meaning man, and had no intention of in any way defrauding the plaintiff; but, upon the death of Craford and his wife, he assumed to deal with the property without in any way consulting the plaintiff.

A drainage scheme of a most extensive character was suggested, by which the lands in question and a large amount of other lands near the Rond Eau were to be reclaimed. Sinclair was apparently inexperienced in farming upon reclaimed lands, his own place being upon high land, and the suggested scheme appeared to him one problematical of success. He was also apprehensive of the great cost involved, the assessment being \$22.50 per acre, in addition to a small annual charge for pumping.

The defendants Perkins and Toll are enterprising young men, who saw the opportunity to which Sinclair was blind. They asked Sinclair his price for the land, and he told them \$10 per acre; and they agreed to buy at that price, paying \$100 down and agreeing to pay \$100 a year, with interest at 7 per cent., until the land was paid for. The total acreage, according to the plan prepared in connection with the drainage scheme, is 62 acres, so that the price, assuming the measurement to be accurate, would be \$620. The lands were really worth much more than this—probably \$50 per acre, with the possibility of being worth several times this figure if the drainage scheme is a success (this price being given upon the assumption that the

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purchaser assumed the whole drainage tax). The purchase by these defendants was *bonâ fide*, although at a great undervalue. The agreement for purchase was not registered, so that the defendants cannot claim the protection of the Registry Act.

The plaintiff contends that Sinclair had no right to make this sale without her concurrence; and in this, I think, she is right. It is laid down in Fisher on Mortgages, 6th ed., p. 193, that where a deed, absolute in form, is taken as security for a debt, the grantee has no power of sale, unless indeed a statutory power of sale can be imported into the deed; nor can the mortgagee foreclose; he holds the land as trustee, and his only remedy, in the absence of the concurrence of the mortgagor, is to have a sale through the Court.

The decision in *Pearson v. Benson* (1860), 28 Beav. 598, is cited in support of this proposition. There Sir John Romilly, finding that an absolute deed was in truth a security, had to deal with the title of a purchaser from the grantee. It was argued that, the transaction being treated as a mortgage, the clauses usually contained in a mortgage-deed must be treated as contained in it, and that therefore there would be a power of sale which would support the title of the purchaser. The learned Judge repudiates this: "I, however, wholly dissent from that doctrine, which might altogether defeat the rights of plaintiffs in cases where purchase-deeds are . . . ordered to stand as a mere security for the money advanced; for if you import a power of sale into such a transaction the property might be lost by a sale from the first purchaser to a second. But that is not the doctrine of the Court: on the contrary, it is not in the power of a person who has made the purchase, and has treated the transaction as such, afterwards to act on it as a security for the money due to him, and to import into the transaction a power of sale which does not exist."

This decision was appealed, and was affirmed by the Lords Justices of Appeal, Knight Bruce and Turner, and has never since been questioned. *Oland v. McNeil* (1902), 32 S.C.R. 23, is not in conflict with this, for there the deed contained a power of sale, and all that is decided is that this power might be exercised without notice.

The question then remains whether the defendants Perkins and Toll are *bonâ fide* purchasers for value from Sinclair, so as to preclude the plaintiff from asserting her right. I have come to the conclusion that they are not. The contract with them is executory. The land has never been conveyed. Upon payment of the balance of the purchase-money, they will have an equity to compel a conveyance of the property to them, but this equity is subject to the plaintiff's prior equity. Her equity to have the land reconveyed to her, upon payment to Sinclair of the balance due to him, cannot be thus defeated. Lord St. Leonards in *Molony v. Kernan* (1842), 2 Dr. & War. 31, has laid down clearly that actual payment of the price is necessary to establish a purchase for value.

The plaintiff, coming to Court seeking to redeem, must be prepared to do equity. She must—and her counsel said she was ready—pay off the balance due to Sinclair. The purchasers are entitled to be refunded the money paid to Sinclair. In this action an accounting is sought, and it was agreed that I should refer the action to the Master to take the account of the amount remaining due to Sinclair.

It is not easy to deal equitably with the question of costs. In the reference, in the absence of misconduct, Sinclair, as mortgagee, would be entitled to be allowed the costs of accounting; but the litigation has been occasioned by Sinclair and his co-defendants setting up absolute title to the lands and the right to convey. I think a fair disposition would be to direct Sinclair on the one hand, and Perkins and Toll on the other, each to bear one-half of the costs of the action down to and including the trial; the costs payable by Perkins and Toll to be set off *pro tanto* against the \$100 which they have paid under the contract. In the accounting between the plaintiff and Sinclair, Sinclair must then give credit for this \$100 and for the half of the costs for which he is liable. In default of payment of the amount found due to Sinclair, within a time to be fixed by the Master, the lands must be resold by the ordinary procedure of the Master's office. The costs of the reference will be reserved to the Master, but they will be given to Sinclair as mort-

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gagge unless he is found by the Master to have been guilty of improper conduct.

Perkins and Toll have served a third party notice, and I understand that this has been directed to be tried at this hearing. They claim as against Sinclair to recover the loss of profit which they would have made by reason of the increase in value of the lands since the purchase, and upon the ground that he had covenanted to convey.

For the reasons given in the recent decision of *McNiven v. Pigott* (1914-5), 33 O.L.R. 78, 335, I do not think that these damages can be recovered. No evidence was given shewing that any other damage had been sustained.

The proper disposition of the third party proceedings is, I think, to make no order, and to leave each party to bear his own costs.

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[IN CHAMBERS.]

April 30.

RE HAMILTON IDEAL MANUFACTURING CO. LIMITED.

*Company—Winding-up—Petition of Shareholders for Order under Dominion Act, R.S.C. 1906, ch. 144—Report of Inspector Appointed under Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 126—Meeting of Shareholders—Vote on Proposal to Wind up—Impairment of Capital—"Just and Equitable"—Evidence—Discretion—Sec. 11 (d), (e), of Dominion Act.*

Ten shareholders of a trading company, each of whom held shares to the extent of at least \$500, petitioned for an order for the winding-up of the company. The hearing of the petition was adjourned, and an order was made under sec. 126 of the Ontario Companies Act, R.S.O. 1914, ch. 178, appointing an inspector to investigate the company's affairs and management. The inspector reported, and his report was submitted to a meeting of the shareholders called by direction of the Court. A majority in value of the shareholders who voted at the meeting was opposed to the winding-up, according to the certificate of the result of the voting signed by the president, but the uncontradicted evidence as to the method by which this result was obtained deprived it of the value that the Court intended it should have. About a year before the filing of the petition, the company sold most of its assets to another company, which had since gone into liquidation, and was indebted to the vendor-company. Outside of moneys due to it, the company's assets were of small value. No active business was being carried on, and there was no apparent prospect of a resuscitation of the business:—

*Held*, in these circumstances, that it was the duty of the Court, in the proper exercise of its discretion, to make an order for the winding-up of the company, under the Winding-up Act, R.S.C. 1906, ch. 144, sec. 11, clause (d), giving the Court power to do so when the capital is im-

paired, and clause (e), giving the Court power to do so when of opinion that it is just and equitable that the company should be wound up. *In re Haven Gold Mining Co.* (1882), 20 Ch.D. 151, and *In re Thomas Edward Brinsmead & Sons*, [1897] 1 Ch. 45, followed.

PETITION by shareholders of the company for a winding-up order under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and also for an order, under the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 126, appointing an inspector to investigate the company's affairs and management.

The petition was heard by KELLY, J., in Chambers.

C. V. Langs, for the petitioners.

G. Lynch-Staunton, K.C., for the company.

April 30. KELLY, J.:—The total number of shares of capital stock of this company issued and outstanding is 400, of which at the time of the filing of the petition 169 were held by the petitioners and 127 by D. H. Fletcher, the president and manager of the company; the remaining shares being held by others, principally in small lots. Of the three directors, two are petitioners.

The petition is for a winding-up, and also for an order appointing an inspector to investigate the company's affairs and management (Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 126).

When the application first came before me, I directed that Mr. C. S. Scott, of Hamilton, should act under the provisions of this section; and on the 25th October, 1914, to which time the motion had been enlarged, he appeared before me and gave evidence submitting his report. I then directed that the information he supplied be submitted to a meeting of the shareholders to be called for that purpose, and the meeting was held on the 29th December, 1914. The motion was renewed before me on the 1st February, 1915.

The company was incorporated in December, 1904, by letters patent under the Ontario Companies Act, and carried on business until 1913. In the latter part of that year, it sold its lands and premises on which it carried on business, and its factory

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buildings, machinery, factory equipment, material on hand, and its patents and some other chattels to the Nagrella Manufacturing Company. The latter company has since gone into liquidation, and is indebted to this company.

Apart from the record of what took place at the meeting of the 29th December, the only pieces of evidence submitted in opposition to the petition are affidavits of Fletcher, who resists the winding-up on the ground that no sufficient reason is shewn for such a course. He contends that the company is solvent, and capable of continuing in its business, and that any want of harmony in reference to its operations pertains to the internal management, with which the Court will not interfere.

The Winding-up Act, R.S.C. 1906, ch. 144, sec. 11, states several grounds on which the Court may make a winding-up order, amongst them being, (*d*) when the capital stock is impaired to the extent of 25 per cent. thereof, and when it is shewn to the satisfaction of the Court that the lost capital will not likely be restored within one year, and (*e*) when the Court is of opinion that it is just and equitable that the company should be wound up. In either of these cases, the application for winding-up may be made by a shareholder holding shares to the extent of at least \$500. Each of the ten petitioners, at the time the petition was presented, was a holder of stock to at least that amount.

The Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 187, provides that a corporation may be wound up, by an order of the Supreme Court, where, in the opinion of the Court, it is just and equitable, for some reason other than the bankruptcy or insolvency of the corporation, that it should be wound up.

There is a distinction between cases in which the real contention is on a question of internal management or mismanagement and cases where what may be termed the foundation upon which the company's business is based is shewn to have disappeared or to have become so weakened as to justify the Court's intervention, and in which a very strong case must be made out to induce the Court to interfere. But, where it is satisfied that the subject-matter of the business for which the company was formed has substantially ceased to exist, the Court will

order a winding-up, although a large majority of the shareholders desire to continue to carry on the company: *In re Haven Gold Mining Co.* (1882), 20 Ch.D. 151.

In order to ascertain whether it is just and equitable that a company should be wound up, on the ground that its substratum is gone, the Court, generally speaking, must look only at the objects of the company as defined by the memorandum of association; but, if it is once established that a part of the substratum is gone, the Court is then bound to consider all the other circumstances in order to ascertain whether it is just and equitable that the company should be wound up: *In re Thomas Edward Brinsmead & Sons*, [1897] 1 Ch. 45. In his reasons for judgment in that case, Vaughan Williams, J. (at p. 61), says: "I think, therefore, that a part of the substratum is gone. I have already said that I do not think I ought to make an order because a part of the substratum of the business, as defined by the memorandum of association, has gone; but I am afraid that I am bound to come to the conclusion that it is a very material part. The price given . . . can only be accounted for on the basis that the user of this name and the goodwill attaching to this business were considered by the vendors and purchasers to be of great value. Under those circumstances I am perfectly clear that there is a state of things which would justify me in making a winding-up order if I thought it right in my discretion so to do—for I have a discretion." The order was made, and the learned Judge, in concluding his reasons, said that he thought the majority of the shareholders had a good business capable of being carried on.

The company now being dealt with was incorporated to buy, sell, and otherwise acquire and dispose of, farm implements and household appliances of all kinds, incubators, brooders, stock-raising apparatus, and machinery, and all articles that may be manufactured from wood or metal, and to buy, sell and otherwise dispose of raw material used in said manufacture.

Almost a year prior to the commencement of these proceedings, it made the sale of its assets above mentioned; and, outside of moneys due to it, its assets are comparatively of small value. There is no active business being carried on, and no

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apparent prospect of a resuscitation of the business. Fletcher's allegations, that the business is being and can be successfully carried on as an agency or brokerage business, have not been shewn to have foundation, and I have the gravest doubts that such a business can be carried on, under the conditions shewn here, with profit to any one but Fletcher himself, or that the lost capital can thereby be restored. The operations of the business for one month about the time the petition was presented resulted in total sales (not profits on sales) amounting to \$50, at an expense to the company of \$125, practically all in wages, of which Fletcher, the president, received \$50.

To account for the present proceedings on the part of some of the petitioning shareholders the president alleges that they have entered into business relationship or partnership amongst themselves in opposition to the business of the company; but the denial of these same parties is such as to put this allegation beyond the possibility of truth. His sworn statements as to this opposition are, so far as one can judge from the material before me, grounded on suspicion and supposition—not facts. His testimony is not supported by that of any other witness, while his statements are contradicted by the affidavits of a number of persons whom I have no reason to disbelieve.

The meeting of shareholders on the 29th December was called by direction of the Court with the object of eliciting the candid opinion of the shareholders in the light of the inspector's report. The sworn statement of what occurred at the meeting—and there is no evidence in contradiction of it—shews that Fletcher's conduct was so arbitrary and high-handed as, in my opinion, to make it quite impossible to get from the shareholders the candid, uninfluenced views which it was sought to obtain. This conduct was not in one matter alone, but extended throughout the meeting, and must have been intended to frustrate the object the Court had in view. The certificate of the result of the voting, signed by him as president and by the secretary of the meeting, shews that a majority in value of the shareholders voting were opposed to the winding-up, but the uncontradicted evidence as to the method by which this result was obtained

deprives it of the value it was intended by the Court that it should have. There is the added fact that between the filing of the petition and the holding of the meeting 38 shares were transferred to persons who were not at the commencement of the proceedings shareholders, and these shares so transferred were represented at the meeting, and the weight of the votes in respect of them was thrown in opposition to the winding-up. Can it be said that these new shareholders were in a position to express a candid or intelligent view?

From the inspector's evidence it appears (and some of this is borne out by other evidence) that the company is without plant, machinery, manufacturing appliances, or patents; that it has an office, but the inspector does not know if it is doing any business; he says that practically it is not carrying on business; and that the capital of the company has been impaired to the extent of nearly one-half.

As is my duty, I have considered these facts, along with the other circumstances presented; and the only conclusion I can come to is, that there is little, if any, prospect of the company doing the business it was brought into existence to do; that the inevitable result of its continuing under the conditions to which it has been brought is to entail loss to every one financially interested in it, except perhaps to Fletcher, who, being in receipt of a salary payable out of its assets, is opposed to a course which will deprive him of that easily earned money. To my mind, the case is brought within the authorities which make it the duty of the Court, in a proper exercise of its discretion, to make the order for the winding-up.

Mr. C. S. Scott is appointed interim liquidator; and there will be a reference to the Local Master at Hamilton to appoint a permanent liquidator, fix the security, and for the other usual purposes.

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[MIDDLETON. J.]

May 1.

## THAMES CANNING CO. v. ECKARDT.

*Sale of Goods—Contract—Statute of Frauds—Receipt and Acceptance—Condition as to Fitness—Right to Inspect and Reject—Shipment from Distant Place—Delivery to Carrier—Inspection at Ultimate Destination—Adequate Cause for Rejection.*

A large quantity of tinned beans were sold by the plaintiffs to the defendants, through a broker. There were no sale notes, but the shipping instructions sent by the broker to the plaintiffs' factory correctly set forth the transaction. The goods were to be sent by carrier from the plaintiffs' factory to the defendants' warehouse; they were not inspected by the defendants before or at the time of shipment, and no notice was given of the time when the goods would in fact be shipped. The goods were shipped as contemplated by the contract, and delivered to the carrier and received from the carrier and taken into the defendants' warehouse, where they were examined, and rejected:—

*Held*, in an action for the price of the goods, that there was an actual receipt and acceptance sufficient to take the case out of the Statute of Frauds.

*Page v. Morgan* (1885), 15 Q.B.D. 228, and *Taylor v. Smith*, [1893] 2 Q.B. 65, followed.

*Held*, also, that the right of inspection existed at the time the goods were examined in the warehouse: where a seller undertakes to deliver goods of a particular quality to a carrier to be forwarded to the buyer at a distant place, to be paid for on arrival, the right of inspection *prima facie* continues till the goods arrive and are accepted at their ultimate destination.

Review of the authorities.

*Pierson v. Crooks* (1889), 115 N.Y. 539, specially referred to.

*Thomson v. Dymont* (1886), 13 S.C.R. 303, distinguished.

And *held*, upon the evidence, that the goods were not of the stipulated quality nor in accordance with the contract; that they were not merchantable as first class goods nor fit for the purpose for which they were sold; that, upon inspection, they were rejected for adequate cause; and the action, therefore, failed.

Action to recover the price of 700 cases of beans alleged to have been sold and delivered by the plaintiffs to the defendants.

April 23. The action was tried by MIDDLETON, J., without a jury, at Chatham.

*J. M. Pike*, K.C., for the plaintiffs.

*O. L. Lewis*, K.C., for the defendants.

May 1. MIDDLETON, J.:—The beans in question were sold by a broker, Mr. Somerville, who says that the transaction was evidenced by bought and sold notes. On the question of fact, I think I must find that there were not any sale notes. Mr. Somer-

ville does not say that he ever sent a sold note to the vendors. He does say that he sent a bought note to the purchaser, but he does not say that the bought note was signed. On an earlier transaction there was a proper sale note, and he kept a carbon copy, apparently prepared in the ordinary course of his business. If there was a note of this sale, one would have expected him to be able to produce a copy or to explain what had become of it. It is most unlikely that a bought note should be sent to the purchaser while a sold note was not sent to the vendors. The truth seems to be that Mr. Somerville's memory has played him false, and that the only document which existed was the shipping instructions sent by him to the canning factory. This memorandum, I think, so far as it goes, correctly sets forth the transaction. The 700 cases of golden wax beans were sold at \$1.30 per case, less an allowance for labels which were to be placed upon the tins by the purchasers, making the net price f.o.b. at the factory \$899.84. The goods were shipped as contemplated by the contract, and delivered to the carrier and received from the carrier and taken into the defendants' warehouse, where they were examined; so that there was an actual receipt and acceptance sufficient to take the case out of the Statute of Frauds; for, to constitute an acceptance within the statute, all that is necessary is, that there should be such a dealing with the goods as to recognise the existence of the contract. A receiving into the warehouse and an examination to ascertain if the goods are in accordance with the contract, is enough, even though the goods are immediately rejected as not being in accordance with its terms: *Page v. Morgan* (1885), 15 Q.B.D. 228; *Taylor v. Smith*, [1893] 2 Q.B. 65.

Although nothing appears on the face of the shipping instructions, the goods were in fact sold as first class goods of the highest grade, and it was known that it was the intention of the defendants to sell these goods, under their own labels, to retail merchants, as goods of the highest quality.

(Concerning the beans themselves there is no complaint; but first class canned goods should be packed in clean, bright, new tins. The packing of these goods was defective. I was unable to learn whether the tins had been originally defective or had

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become defective while in the plaintiffs' possession. From the way in which they were said to have been handled I rather suspect the latter. The tins were certainly not clean, bright tins; they were scratched and battered with innumerable small dents, so that, as one witness put it, they looked like second-hand tins. Another witness described the appearance as that of hammered brass. A more serious defect was the fact that the tins had evidently been kept in a moist place and had become rusty, and an endeavour had been made to improve the condition by covering the heads of many of the tins with a greenish lacquer, and other tins had been painted with an aluminum paint. While to some extent this concealed the rusty and dirty condition, it gave to the tins an appearance of antiquity and renovation which undoubtedly would be most prejudicial when they came to be placed upon the retail market. These doctored tins were scattered throughout all the cases, constituting perhaps 20 per cent. of the whole; an additional 20 per cent. being disfigured by the battering and rust.

This careless treatment of the tins in which the goods were contained undoubtedly degraded the goods and seriously impaired the merchantability of the packages, rendering them quite unfit for the purpose for which they were bought, namely, the labelling with Mr. Eckardt's "Monarch" brand and the placing of them on the market as goods of the highest grade.

The goods were not inspected at the time of shipment. No notice was shewn to have been given of the time when the goods would in fact be shipped. As soon as they arrived at Mr. Eckardt's warehouse, the defective condition was revealed, complaint made, and the goods rejected. Mr. Thomas, who succeeded Mr. Somerville in his agency, quite agreed that the complaint was justified, and from the evidence of the practical men called before me I am of the same view.

Then it is said that the place of inspection was the point of delivery, and that, no inspection having taken place there, the purchaser cannot now object, and that he must keep the goods, relying upon a cross-action or counterclaim for damages by reason of the defective quality.

In considering this question it must be kept in mind that this

is not a mere warranty, but a condition. In Smith's Leading Cases, 11th ed., vol. 2, p. 28, is a statement accepted as accurate in Blackburn's Contract of Sale, 3rd ed., p. 541, in which the position is clearly stated: "Where the subject-matter of the sale is not in existence, or not ascertained, at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty but a condition, the fulfilment of which is precedent to any obligation of the vendee under the contract, because the existence of these qualities, being part of the description of the thing sold, becomes essential to its identity, and the buyer cannot be forced to receive and pay for a thing different from that for which he contracted."

In this way the case resolves itself into the old and familiar situation. The Court cannot make for the parties a contract they have not themselves made. The defendants, who contracted to purchase beans in bright, clean, new tins, cannot be compelled to accept any beans not so packed, unless from their conduct there can be implied a new contract so to do.

Now, the rule as to what is to be implied from a failure to inspect at the place of delivery is by no means as drastic as the plaintiffs contend. It is thus stated in Benjamin on Sale, 5th ed., p. 753: "The buyer's opportunity of inspection *primâ facie* arises at the place of delivery; but it need not necessarily be the place of delivery, for the contract may expressly or by implication provide that the time for inspection shall be subsequent to delivery, and the place of inspection shall be different from that of delivery."

It is to be noticed that this does not speak of an obligation of the purchaser alone; it is "the opportunity of inspection;" and this implies as great an obligation on the part of the vendor to afford an adequate opportunity of inspection as it imposes a duty on the purchaser to avail himself of the opportunity and then and there inspect.

The judgments of Brett, J., in *Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438, and *Grimoldby v. Wells* (1875), L.R. 10 C.P. 391, justify not only the text but this comment.

*Pierson v. Crooks* (1889), 115 N.Y. 539, accepted by the editors of the last edition of Benjamin as good law, illustrates

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this well. Iron was sold in Liverpool f.o.b. there. The iron sent was not of the quality agreed. There was no inspection at Liverpool, but rejection at New York. The Court of Appeals held: "The fact that the buyers had no agent at Liverpool, and that the sellers could ship on board vessels selected by themselves without notice to the buyers of the name of the ship or of the time of shipment, shewed that Liverpool was not the place of inspection; for the *primâ facie* rule is that where a seller undertakes to deliver goods of a particular quality to a carrier to be forwarded to the buyer at a distant place, to be paid for on arrival, the right of inspection *primâ facie* continues till the goods arrive and are accepted at their ultimate destination."\*

In *Fogel v. Brubaker* (1888), 122 Penn. St. 7, the Supreme Court of Pennsylvania, dealing with the case of goods sold without being seen by the purchaser, where the vendor has undertaken that they shall be of given quality or description, and the goods have been delivered to a carrier, thus defines the rights of the parties (p. 15): "It is true that a delivery to the carrier is for many purposes a delivery to the purchaser, but such delivery is constructive merely. The obligation to accept or reject the article arises, however, only upon an actual delivery. It is when the articles come under the observation of the purchaser and he is able to see whether they are such as he has ordered, that he is bound to elect whether to accept them or not. It is not his duty to go to the point where delivery is made to the carrier, to inspect the articles before their shipment; for he has a right to rely on the good faith of the seller who has undertaken to fill his order, according to its terms, and ship to him by the ordinary modes of transportation, and when the articles reach him is the first time at which examination is practicable, and is the time contemplated by the contract. If the articles upon reaching their destination are not found to be such as the contract calls for, the seller has not performed on his part, and has no right to ask performance to any extent from his vendee. It was his own folly or fraud to ship an article not ordered."

In *Molling and Co. v. Dean and Son Limited* (1901), 18

\*This quotation is from Benjamin, 5th ed., p. 755.

Times L.R. 217, Lord Alverstone, C.J., delivering the judgment of a Divisional Court, adopted a similar principle. A German firm supplied books, some of which were to be sold in England and some in America. It was held that the inspection and rejection might take place in America, although the books were delivered to carriers in Germany.

*Dyment v. Thompson* (1885-6), 9 O.R. 566, 12 A.R. 658, S.C., *sub nom. Thomson v. Dyment* (1886), 13 S.C.R. 303, is naturally much relied upon by the plaintiffs, and is undoubtedly binding upon me; but on carefully considering this case it will be found that the decision is in accordance with the principle as indicated. There the sale was of a very large quantity of lumber. No place was named for the delivery or inspection. It was, however, received at the mill; and under all the circumstances the proper implication was that the inspection and rejection must have been understood to have been contemplated to take place at the point of delivery. Manifestly this is so in the case of a commodity such as lumber, where every board must be subjected to scrutiny. It could never have been contemplated that all that was tendered by the vendor should be carried away from the mill before there was in fact an election by the purchaser to accept or reject. This case was thus regarded by the Court of King's Bench of Manitoba, presided over by Chief Justice Kilham, in *Lewis v. Barré* (1901), 14 Man. R. 32, 38, where he says: "The ratio decidendi in all the Courts seems to have been that the place of inspection was at the mill of the manufacturer."

For these reasons, I determine that the goods were not of the stipulated quality nor in accordance with the contract: that they were not merchantable as first class goods nor fit for the purpose for which they were sold; that the right of inspection existed at the time the goods were inspected in the warehouse; and that, upon inspection, they were at once rejected for adequate cause.

The action therefore fails. If I should be in error in this, I would assess at \$250 the difference in value between goods contracted for and goods supplied.

*Action dismissed with costs.*

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## DANGLER V. HOLLINGER GOLD MINES LIMITED.

*Alien Enemy—Action by Administrator under Fatal Accidents Act—Benefit of Alien Enemies—Summary Dismissal.*

An action under the Fatal Accidents Act, R.S.O. 1914, ch. 151, brought by the administrator (duly appointed by the proper Surrogate Court) of the estate of a deceased person, cannot be maintained if brought for the benefit of alien enemies of the King.

*Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co. Limited*, [1915] 1 K.B. 893, considered and distinguished.

Such an action, launched after the commencement of the war, was dismissed, upon the summary application of the defendants, with costs.

*Dumenko v. Swift Canadian Co. Limited* (1914), 32 O.L.R. 87, applied and followed.

APPLICATION by the defendants for an order dismissing the action, upon the ground that the persons for whose benefit it was brought were alien enemies of the King.

The action was begun on the 4th February, 1915; it was brought under the Fatal Accidents Act, R.S.O. 1914, ch. 151, by the administrator of the estate of Steve Samurski—who was crushed in a shaft of the defendant company and so injured that he died—to recover damages for his death. The action was brought for the benefit of John Samurski and Agnes Samurski, the father and mother of the deceased; and it was admitted that at the time the action was brought and at the time the application was made they were subjects of the German Emperor and resident in Germany.

April 26. The application was heard by SUTHERLAND, J., in the Weekly Court at Toronto.

*G. H. Sedgewick*, for the defendants.

*H. S. White*, for the plaintiff.

May 1. SUTHERLAND, J.:—This is an application for an order dismissing the action, on the ground that the persons for whose benefit it is brought are alien enemies of His Majesty the King.

On the 28th April, 1914, one Steve Samurski was crushed in a shaft of the defendant company, and so badly injured that

his death resulted. The plaintiff is the administrator of his estate, duly appointed by a Surrogate Court of this Province.

The action is brought under R.S.O. 1914, ch. 151, the Fatal Accidents Act. By sec. 4, sub-sec. (1), "every such action shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused," etc. The Act also provides (sec. 6) that every action shall be commenced within twelve months after the death of the deceased, and that (sec. 7) the plaintiff in his statement of claim shall set forth full particulars of the persons for whom and on whose behalf the action is brought. By sec. 8, it further provides that, "if there is no executor or administrator of the deceased, or there being such executor or administrator, no such action is, within six months after the death of the deceased, brought by such executor or administrator, such action may be brought by all or any of the persons for whose benefit the action would have been if it had been brought by such executor or administrator."

In paragraph 3 of the statement of claim, the plaintiff alleges that he "brings this action as administrator of the estate of the said Steve Samurski and for the benefit of John Samurski and Agnes Samurski, the father and mother respectively of the said Steve Samurski, deceased, and being persons dependent upon the said Steve Samurski for maintenance and support."

The defendant company, by para. 12 of their statement of defence, plead that "John Samurski and Agnes Samurski, for whose benefit the plaintiff alleges this action is brought, are subjects of the Emperor of Germany and reside within the limits of the German Empire and are alien enemies of His Majesty the King. and the plaintiff says that on these grounds this action should be dismissed."

It was on the argument admitted on behalf of the plaintiff that the father and mother of the deceased man are subjects of the Emperor of Germany and reside in Germany.

By Imperial Act 4 & 5 Geo. V. ch. 87, intituled "An Act to make provision with respect to penalties for Trading with the Enemy, and other purposes connected therewith," it is enacted, sec. 1 (2): "For the purposes of this Act a person shall be

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deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy."

On the 9th September, 1914, a proclamation relating to trading with the enemy was issued, and para. 5 thereof is to the following effect: "From and after the date of this Proclamation the following prohibitions shall have effect (save so far as licenses may be issued as hereinafter provided), and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions—(1) Not to pay any sum of money to or for the benefit of an enemy."

This action is for the benefit of the father and mother of the deceased, who are undoubtedly alien enemies.

In *Dumenko v. Swift Canadian Co. Limited* (1914), 32 O.L.R. 87, it was held by Sir Glenholme Falconbridge, C.J.K.B., in an action commenced before war was declared, that the plaintiffs, who were Austrians and entitled to bring the action during peace, became disentitled after a declaration of war in consequence of which they became alien enemies. On the defendants obtaining a præcipe order for security for costs, and the Master making an order extending the time for the giving of the security, and further ordering that in default the action should be dismissed, the plaintiffs moved in Chambers "for an order staying all proceedings . . . so long as may be ordered by the Court or for such further and other order as to the said Court may seem meet and just." The defendants thereupon gave notice that on the return of the motion they would move that the action be dismissed, on the ground that the plaintiffs were alien enemies. It was held: "As to the defendants' motion, it is quite clear upon the authorities that the plaintiffs, having become alien enemies, ought to be barred from further having and maintaining this action. See *LeBret v. Papillon* (1804), 4 East 502; *Brandon v. Nesbitt* (1794), 6 T.R. 23; Mews' Digest, vol. 8, pp. 210, 211. The plaintiffs' action is, therefore, on this

ground also, dismissed with costs. This dismissal is not necessarily—and I do not mean it to be—a bar to a subsequent action in respect of the same matter after peace shall have been declared: *Holmsted & Langton's Judicature Act*, 3rd ed., p. 636."

I was referred by counsel for the applicant to the following cases: *Porter v. Freudenberg*, *Kreglinger v. Samuel and Rosenfeld*, *In re Merten's Patent* (1915), 31 Times L.R. 162.\* In the first of these cases there is a general discussion as to the rights of alien enemies in British Courts, and the Attorney-General, who appeared for the Crown, makes an elaborate argument and citation of authorities. At p. 166 the Lord Chief Justice, reading the considered judgment of the Court in the three cases, deals with the question of the meaning of the term "alien enemy," when used in reference to civil rights and liabilities, and says: "Alien enemies have no civil rights or privileges, unless they are here under the protection and by permission of the Crown (*Blackstone's Commentaries*, 21st ed., vol. 1, ch. 10, p. 373)." And further at p. 167: "Whenever the capacity of an alien enemy to sue or proceed in our Courts has come for consideration the authorities agree that he cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm."

The case of *Maxwell v. Grunhut* (1914), 31 Times L.R. 79, is a somewhat curious one, and determines that an agent in England "of a principal, who is an alien enemy, is not entitled to bring an action against him for a declaration that the agent is entitled to collect debts due to the principal and to pay debts due from the principal, or for the appointment of a receiver of the assets of the principal's business in this country." At p. 80, the Lord Chief Justice said, with reference to the action, that "it was quite impossible to sustain it, and it was obvious that the agent could have no greater right than his principal who, being an alien enemy, could not sue. In his judgment the claim put forward must be barred; the difficulties in the way were insuperable. He thought that Mr. Justice Scrutton was

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quite right in refusing to appoint a receiver, and in saying that he had no jurisdiction. The plaintiff's application therefore would not lie, and must be dismissed."

Counsel for the plaintiff in opposing the motion relied on the case of *Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co. Limited*, [1915] 1 K.B. 893. The plaintiff company was incorporated in England and carried on business at their registered offices in London. The company were suing on bills accepted by the defendants for goods supplied before the declaration of war. It was contended on behalf of the defendants that the company "must be regarded as an alien enemy . . . and that as commercial intercourse between persons under the protection of the Crown and persons who are alien enemies is illegal, payment to the plaintiff company must be illegal." It was held "that the company did not change its character of an English company because on the outbreak of war all the shareholders and directors resided in an alien enemy country and became alien enemies; that once a corporation has been created in accordance with the requirements of the law it is an English company notwithstanding that all its shareholders may be aliens; that payment of a debt to the plaintiff company was not a payment to the alien enemy shareholders or for their benefit, and that the right of the plaintiff company to recover in an action brought to recover a debt due to them was therefore not affected by the fact that practically the whole of the shares were held by alien enemies." Lord Reading, C.J., says at p. 903: "It cannot be disputed that the plaintiff company is an entity created by statute. It is a company incorporated under the Companies Acts and therefore is a thing brought into existence by virtue of statutory enactment. At the outbreak of war it was carrying on business in the United Kingdom; it had contracted to supply goods, it delivered them, and until the outbreak of the war it was admittedly entitled to receive payment at the due dates. Has the character of the company changed because on the outbreak of war all the shareholders and directors resided in an enemy country and therefore became alien enemies? Admittedly it was an English company before the war. An English company cannot by reason of these facts cease

to be an English company. It remains an English company regardless of the residence of its shareholders or directors either before or after the declaration of war. Indeed it was not argued by Mr. Gore-Browne that the company ceased to be an entity created under English law, but it was argued that the law in time of war and in reference to trading with the enemy should sweep aside this technicality,' as the entity was described, and should treat the company not as an English company but as a German company and therefore as an alien enemy. If the creation and existence of the company could be treated as a mere technicality, there would be considerable force in this argument. It is undoubtedly the policy of the law as administered in our Courts of justice to regard substance and to disregard form. Justice should not be hindered by mere technicality, but substance must not be treated as form or swept aside as technicality because that course might appear convenient in a particular case. The fallacy of the appellants' contention lies in the suggestion that the entity created by statute is or can be treated during the war as a mere form or technicality by reason of the enemy character of its shareholders and directors. A company formed and registered under the Companies Act has a real existence with rights and liabilities as a separate legal entity. It is a different person altogether from the subscribers to the memorandum of the shareholders on the register (*per* Lord Macnaghten in *Salomon v. Salomon & Co.*, [1897] A.C. 22, at p. 51). It cannot be technically an English company and substantially a German company except by the use of inaccurate and misleading language. Once it is validly constituted as an English company it is an artificial creation of the Legislature and it retains its existence for all intents and purposes. It is a living thing with a separate existence which cannot be swept aside as a technicality. It is not a mere name or mask or cloak or device to conceal the identity of persons and it is not suggested that the company was formed for any dishonest or fraudulent purpose. It is a legal body clothed with the form prescribed by the Legislature. In determining whether a company is an English or foreign corporation no inquiry is made into the share register for the purpose of ascertaining whether the members of the com-

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pany are English or foreign. Once a corporation has been created in accordance with the requirements of the law it is an English company notwithstanding that all its shareholders may be foreign. Just as a foreign corporation does not become British and cease to be foreign if all its members are subjects of the British Crown (*per* Lord Macnaghten, Lord Brampton, and Lord Lindley in *Janson v. Driefontein Consolidated Mines*, [1902] A.C. 484, at p. 497). For the appellants' contention to succeed, payment to the company must be treated as payment to the shareholders of the company, but a debt due to a company is not a debt due to all or any of its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22. The company and the company alone is the creditor entitled to enforce payment of the debt and empowered to give to the debtor a good and valid discharge. Once this conclusion is reached it follows that payment to the plaintiff company is not payment to the alien enemy shareholders or for their benefit."

It is contended on behalf of the plaintiff that the right of action is clearly given under the Fatal Accidents Act to an executor or an administrator, and that it is an administrator duly appointed by a competent Surrogate Court of the Province who has brought the action. It is argued that, as a company incorporated in Great Britain, even though its directors and shareholders are alien enemies, has a right to bring an action for the recovery of a debt due the company, even so an administrator, duly appointed by a Surrogate Court of this Province to represent the estate of the deceased person, is legally entitled to bring an action for a claim such as is involved in this action, even though the benefit accrue to alien enemies.

It is also contended that in any event, even if an order were made to stay the action, there should be no order to dismiss it. It is furthermore pointed out that even to stay the action may result in hardship and damage to the plaintiff, inasmuch as in actions of this character, the witnesses being in many cases miners and people who float about from place to place, the evidence necessary to establish a claim may be lost.

If this were an action by the administrator to assert a claim for a debt due the estate of the deceased person, I would be dis-

posed to think there might possibly be some analogy between this case and the *Continental Tyre and Rubber Company* case. But, where the action is brought under an Act by which it is expressly provided that it shall be for the benefit of the parents etc., and such parents are, as here, unquestionably alien enemies, a different view should, I think, be taken, and it should be held that the plaintiff has no right of action.

In *Blake v. Midland R.W. Co.* (1852), 18 Q.B. 93, an action by the administratrix of a deceased person under 9 & 10 Vict. ch. 93, it was held that the jury, in estimating damages, could not "take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only." Coleridge, J., at p. 109, says: "The title of this Act may be some guide to its meaning: and it is 'An Act for compensating the families of persons killed;' not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly given action may be maintained although death has ensued; the argument being that the party injured, if he had recovered, would have been entitled to a solatium, and therefore so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representative, but *gives to the representative* a totally new right of action, on different principles." At p. 110: "The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum, independent of all pecuniary estimate, to soothe the feelings; and the division of the amount strongly leads to the same conclusion: 'And the amount so recovered' 'shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct.' "

And in *Pym v. Great Northern R.W. Co.* (1863), 4 B. & S. 396, at p. 407, Erle, C.J., says: "The remedy however given by the statute is not given to a *class* but to *individuals*, for by sec. 2 'The jury may give such damages as they may think proportioned to the injury resulting from such death to the parties

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respectively for whom and for whose benefit such action shall be brought.' "

In *Seward v. The "Vera Cruz"* (1884), 10 App. Cas. 59, at p. 67, the Earl of Selborne, L.C., says: "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, '*actio personalis moritur cum personâ*,' because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor."

See also *Town of Walkerton v. Erdman* (1894), 23 S.C.R. 352, at p. 366, where King, J., says: "If indeed the admissibility of the evidence were to depend upon the causes of action being the same the respondent could not hope to succeed, because it is conclusively established that the cause of action given by the statute is different from that which the deceased had in his lifetime."

The administrator can, I think, have no higher right than those for whom he has brought the action. If he had failed for six months to do so, the parents of the deceased man would themselves have had the right to institute the action; but, if they had done so, they would have been met with what would be a fatal defence, the plea that they were alien enemies. This would have disentitled them to succeed.

If I could see my way to do so, I would prefer to make an order staying the action, for the reason that, if it is dismissed, the statutory period may possibly run and so put an end to the action.

I think, however, I must hold that the action must be dismissed with costs.

[HODGINS, J.A.]

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## TRUSTS AND GUARANTEE CO. LIMITED v. GRAND VALLEY R.W. CO.

*Receiver—Railway Company—Trustee for Holders of Mortgage-bonds—Passing Accounts and Fixing Remuneration of Receiver—Right of Bondholders to be Heard—Appointment of Solicitor as Representative—Lapse upon Appointment as County Court Judge—Re-opening of Accounts—Ruling of Master—Leave to Appeal from—Necessity for Certificate—Practice—Costs.*

By order of the Court, in May, 1912, the manager of the plaintiff company was appointed receiver on behalf of the plaintiff company, as trustees for the holders of mortgage-bonds issued by the defendant company, of all the defendant company's railways and undertakings comprised in or subject to the security created by the said bonds and the bond mortgages made by the defendant company to the plaintiff company. The receiver was by the order also authorised to pay debts which had priority over the claims of the bondholders, and the moneys necessary to provide for electric power, as well as to repair and improve the mortgaged property, and was to be allowed these payments in his account:—

*Held*, that the plaintiff company, as mortgagees, did not, as between them and their receiver, represent the bondholders, and the latter were entitled to be heard upon the passing of the accounts and fixing the remuneration of the receiver.

The accounts of the receiver were passed by the Master in June and October, 1913, and November and December, 1914. In 1913, the bondholders were not represented, although W., who was solicitor for the defendant company, and was himself a bondholder, attended, as he said, "to represent all parties in any way interested in the passing of the accounts and the remuneration to be allowed." In October, 1914, W. was appointed by the Master to represent bondholders, but, before the return of the appointment for the passing of the receiver's accounts, W. became a County Court Judge; and, at the actual passing of the accounts, two other solicitors, as agents for W., appeared and took part:—

*Held*, that W.'s appointment to represent the bondholders must be taken to have lapsed upon his taking office as a County Court Judge; his request to other solicitors to appear for him did not cure this defect; and the bondholders were, therefore, without representation on the two occasions when the accounts were passed.

And *held*, that the reference should be re-opened and the receiver's accounts and the question of his remuneration again investigated upon notice to the bondholders, especially as that remuneration or part of it might be claimed by the plaintiffs as being received by their manager on their behalf.

*Held*, also, that, before moving for leave to appeal from the ruling of the Master declining to re-open, the objecting bondholders should have procured and filed his certificate of that ruling.

Consideration of the question of costs.

MOTION by holders of bonds of the defendant railway company to open up the question of the remuneration of the receiver, or to extend the time for appealing and for leave to appeal from the reports of the Master in Ordinary, of October, 1913, and December, 1914, and from the ruling of the Master on the 21st

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January, 1915, that he would not re-open the question of remuneration.

April 21. The appeal was heard by HODGINS, J.A., in the Weekly Court at Toronto.

*W. S. Brewster*, K.C., and *J. H. Fraser*, for the applicants.

*G. H. Watson*, K.C., for the receiver.

*Grayson Smith*, for the plaintiffs.

May 4. HODGINS, J.A.:—Motion on behalf of holders of the bond issue of 1902 and of those exchanged for bonds of the issue of 1907 to open up the question of the remuneration of the receiver of the defendant railway company, fixed on two appointments June-October, 1913, and December, 1914, at which the accounts of the receiver were passed. In the alternative, an order is asked extending the time and granting leave to appeal against the reports of October, 1913, and December, 1914, and against the ruling of the Master in Ordinary on the 21st January, 1915, that he would not re-open the question of remuneration. Numerous affidavits have been filed on this application, and a copy of the notes taken by the clerk of the Master in Ordinary has also been furnished.

It appears that on the 29th May, 1912, an order was made by Mr. Justice Latchford in this action, of which paragraph 2 is as follows: "This Court doth order that Edward Bentley Stockdale, of the city of Toronto, manager of the plaintiff company, be and he is hereby appointed until further order receiver (he first giving security to the satisfaction of the Master in Ordinary), on behalf of the plaintiffs, as trustees for the holders of mortgage-bonds issued by the defendants, of all the defendants' railways and undertakings and of the revenues, issues, and profits thereof, and all property whatsoever, whether present or future, comprised in or subject to the security created by the said bonds and the bond mortgages made by the defendants to the plaintiffs, dated respectively the 30th day of May, 1902, and the 27th day of August, 1907, with power to manage and operate said railways and undertakings of the defendants, and to pay all outgoings necessary for that purpose."

The receiver, pursuant to that order, managed and operated the defendant railway company until its sale in 1915, and performed various services thereunder, said to be onerous and important. The present complaint is not so much as to the details of his receipts and payments as receiver, as to the amounts allowed to him as his remuneration, which are as follows: in June, 1913, \$11,362.85; in November, 1914, \$10,911.58.

From the notes of the Master in Ordinary it appears that in 1913 Mr. J. G. Wallace—now His Honour Judge Wallace—appeared for the defendants. In October, 1914, Mr. Wallace was, as appears in the notes, appointed by the Master in Ordinary to represent bondholders, the defendant railway company, and also the Thames Valley and Ingersoll Railway Company. Mr. Wallace having been, before the return of the appointment, appointed Judge of the County Court of the County of Oxford, Mr. Ballantyne, and later Mr. Ritchie, as agents for Mr. Wallace, appeared and took part in the passing of the accounts. Judge Wallace in his affidavit states that he was present also. It would seem that the items of receipts and expenditures were fully gone over by him. Judge Wallace is the holder of \$2,000 of the bonds of 1902 and of \$6,000 of the bonds of 1907, and says he has since the appointment of the receiver represented over \$100,000 of bonds; and that, while in 1913 he was solicitor for the defendant railway company, he attended “to represent all parties in any way interested in the passing of the accounts and the remuneration to be allowed.”

Upon the argument before me, it appearing that the receiver is and was manager of the plaintiff company, the question was raised as to whether the plaintiff company were interested in the remuneration of the receiver, which has apparently been paid over and is included in the accounts, as appears by the Master's notes.

The order of the 29th May, 1912, appoints the manager of the plaintiff company receiver “*on behalf of the plaintiffs, as trustees for the holders of mortgage-bonds issued by the defendants, of all the defendants' railways and undertakings . . . comprised in or subject to the security created by the said bonds and the bond mortgages made by the defendants to the plaintiffs,*

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dated respectively the 30th day of May, 1902, and the 27th day of August, 1907."

His position, therefore, is analogous to that of a receiver of property and franchises included in the security, appointed by the mortgagee himself, whose appointment is sanctioned by an order of Court authorising him to take possession.

Usually the receiver appointed by the Court is an officer of the Court and represents neither the plaintiff nor the defendant. See *Moss Steamship Co. Limited v. Whinney*, [1912] A.C. 254; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160.

In the order already mentioned, the receiver, while appointed on behalf of the plaintiffs and accountable to them, is also authorised to pay debts which have priority over the bondholders, and the moneys necessary to provide for electric power, as well as to repair and improve the mortgaged property, and it is further provided that he is to be allowed these payments in his account. These are somewhat unusual powers to be given except on notice to the bondholders, who were not represented on the motion for this order. The direction that the payments made in pursuance thereof were to be allowed in the receiver's account gives point to the objection that the bondholders should, some time or other, have the right to be present on the passing of the receiver's accounts.

The plaintiffs as mortgagees do not, as between them and their receiver, represent the bondholders, and hence in passing the accounts and fixing remuneration the latter are entitled to be heard. Indeed, this seems to have been recognised in 1914, when the appointment of Mr. Wallace was made as representing the bondholders.

But in 1913 no representation was ordered; and, while Mr. Wallace was no doubt a bondholder, he had no status or authority when appearing for the defendant company to bind his fellow-creditors.

In 1914, his appointment must be taken to have lapsed on his appointment as County Court Judge. A Judge cannot, no matter how well qualified, appear for or represent any litigant in a Court of justice. Judge Wallace's request to other solici-

tors to appear for him did not cure this defect, but indicates that he properly recognised this inherent disability.

This leaves the bondholders without representation on the two occasions when the accounts were being passed. These included payments authority for which was given by the order, but the amounts and propriety of which were of much interest to those holding securities.

When the receiver's remuneration was being fixed, another consideration was bound to arise, having regard to the terms of the order to which I have referred. The duty of the plaintiff's solicitors in regard to the receiver is very clearly pointed out in the case of *In re Lloyd* (1879), 12 Ch.D. 447, and the rule dates at least from Lord Eldon's time. See *Sykes v. Hastings* (1805), 11 Ves. 363. Here, owing to the fact that the receiver was in effect the hand of the mortgagees to enforce their remedies and was their own general manager, that duty could perhaps hardly be expected of their solicitors. It was therefore doubly necessary that some one really interested should be heard on the question of remuneration, especially as that remuneration or part of it might be claimed by the plaintiffs as being received by their manager on their behalf, and the fees and charges of the plaintiffs themselves, as trustees for bondholders, must, if not settled in the mortgage-deed, be reduced by the amount of the receiver's remuneration.

For these reasons, I think the objecting bondholders were entitled to be heard before the Master in Ordinary. If authority is needed, the following may be referred to: *Wildridge v. McKane* (1827), 2 Moll. 545; *In re Browne's Estate* (1887), 19 L.R. Ir. 183, 423.

I inquired on the motion whether the receiver's remuneration was, in view of his relation to them, claimed by or divided with the plaintiffs, but I was not informed upon the point. I think it is a matter which is open to the bondholders to inquire into, if they desire to do so, as it may affect the quantum, having regard to the mortgage-deed, which no doubt will be before the Master. The amounts allowed for remuneration are large, and the balance to be received by the

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bondholders will apparently be small; so that the payments by the receiver, while authorised by the order, should be approved by them, or dealt with from their standpoint rather than from that of the defendant company, which has no real interest in the matter.

I give leave to appeal as to the passing of the accounts and fixing the receiver's remuneration in 1913 and 1914, and also from the ruling or decision of the Master in Ordinary in 1915, declining to re-open them; or, if the parties prefer it, these matters may be referred back to the Master in Ordinary, with leave to the bondholders to surcharge or falsify, confined to the payments referred to in paragraph 5 of the order of the 29th May, 1912, and the quantum of remuneration and its propriety, having regard to the provisions of the mortgage-deed and the relations of the plaintiffs and the receiver.

With regard to the ruling or decision of the Master in 1915, declining to re-open, the applicants should have procured and filed his certificate thereof before the motion was heard. They should now do so; and upon that being done the order may issue. Their procedure being defective, I can give them no costs of this application. I do not think the receiver should have opposed the motion, in view of the considerations I have mentioned; so that he should also bear his own costs. No doubt his opposition was prompted by what he thought was an attack on his management; but, if that was intended, it was not pressed. He is, however, an officer of the Court, and the review of the accounts, to the extent I have mentioned, will tend to satisfy those who are chiefly interested in the balance left and avoid any feeling of possible injustice—a consideration which I deem of much importance.

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May 8.

*Contract—Judicial Sale of Land by Tender—Satisfaction of Liens—Threat of Proceedings to Set aside Sale—Promise of Purchaser to Pay Profit on Resale to Lien-holders—Enforcement—Consideration—Forbearance—Statute of Frauds—Interest in Land—Action for Money.*

Land being offered for sale by tender, under the direction of the Court, to satisfy liens upon it, the defendant was the highest tenderer and became the purchaser; but the plaintiff, the chief lien-holder, threatened proceedings to set aside the sale to the defendant, whereupon the defendant said to the plaintiff: "If you drop the proceedings, when I sell the land whatever difference is between what I get for it and what I pay I'll hand over to the lien-holders." There was nothing in writing. The plaintiff took no proceedings, and the defendant obtained a vesting order. This was in 1909; and in January, 1915, the defendant sold the land at a profit:—

*Held*, that the forbearance of the plaintiff was sufficient consideration for the defendant's promise; that the Statute of Frauds had no application; and that the plaintiff was entitled to judgment for the amount of the profit made by the defendant, to be applied in payment of what was owing to the lien-holders.

The plaintiff's right of action arose upon and after the sale made by the defendant in 1915: the lapse of time did not affect the situation.

The money was derived from the sale of land, but the bargain was about the money alone, and was outside of the Statute of Frauds.

*Poulter v. Killingbeck* (1799), 1 B. & P. 397, and *Troubridge v. Wetherbee* (1865), 93 Mass. (11 Allen) 361 (approved by STRONG, C.J., in *Stuart v. Mott* (1894), 23 S.C.R. 153, 384, 388), followed.

ACTION to recover the difference between the price at which the defendant bought land and the price at which he sold it, pursuant to a promise or agreement said to have been made by the defendant, in the circumstances set out in the judgment.

The action was tried by BOYD, C., without a jury, at Stratford.

*R. S. Robertson and J. J. Coughlin*, for the plaintiff.

*Sir George Gibbons, K.C.*, and *G. G. McPherson, K.C.*, for the defendant.

May 8. BOYD, C.:—I reserved judgment after the trial and argument at Stratford to consider the effect of the Statute of Frauds, which was pleaded at the last moment. It was confidently asserted on the one hand and denied on the other that the statute was applicable, but no cases were cited.

The result of the evidence, though contradictory, was, to my



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mind, abundantly clear in affirmance of the position taken by the plaintiff.

Briefly, these were the facts. Land covered by mechanics' liens was sold under the direction of the Court to satisfy these liens. After an abortive sale, it was again offered for sale by tender. The plaintiff, who had the conduct of the sale, put in a tender in the name of one of the subsequent lien-holders, and the defendant put in a higher, and in fact the highest, tender, at \$2,100, and was declared to be the purchaser. This defendant had been in confidential communication with the lien-holders, and so obtained information which he used, as alleged, to their detriment, in his tender. Next day, the present plaintiff (the chief lien-holder) instructed his lawyer to take proceedings to set aside the sale upon the highest tender; and, this being communicated to the defendant, he said: "If you drop the proceedings, when I sell the land whatever difference is between what I get for it and what I pay I'll hand over to the lien-holders." The promise, in other words, was just this: "Let the sale be carried out by the Court, and when I sell the property and recoup my own expenditure, I'll give the balance of the proceeds of the sale to the lien-holders." It is argued that this was an unthinkable proposition, but the defendant's situation may have been such with the bank of which he was manager that he did not wish to have his action in making the tender canvassed by public investigation at that time. However this may be, I am persuaded by the evidence of three witnesses that this was his undertaking and promise, on faith of which the attack upon his conduct was abandoned.

The sale was on the 16th September, and the vesting order obtained on the 11th October, 1909; he held and rented the land till it was, in January, 1915, sold for \$3,000.

The inducement for the defendant's promise was the immediate forbearance, at a critical moment, of the prosecution of the claim to set aside the highest tender, and, whether the attack was likely to succeed or not, was sufficient consideration; and, in that view, the Statute of Frauds has no application, though the sale of the land out of which payment was promised might

not happen for many years: *Miles v. New Zealand Alford Estate Co.* (1886), 34 W.R. 669, 32 Ch.D. 266.

Again, the arrangement as to acquisition of the land being executed and completed, it was open for the plaintiff to sue on the promise to pay, which relates only to money: *Green v. Sad-dington* (1857), 7 E. & B. 503. The doctrine of this case may be questionable, but I would not rest the decision on this ground.

Consider it in the light of another line of cases which lead to the conclusion that the Statute of Frauds, so far as it relates to an interest in land, has no bearing on a promise of this kind. It is clearly laid down in American law that a parol promise to pay to another a portion of the profits made by the promisor in a purchase and sale of real estate is not within the Statute of Frauds, and, if founded upon sufficient consideration, will support an action: *Troubridge v. Wetherbee* (1865), 93 Mass. (11 Allen) 361.

This precise point does not appear to be definitely decided in England, though there are English decisions or dicta pointing that way. The American view was accepted by Chief Justice Strong in *Stuart v. Mott*, 23 S.C.R. 384, 388, though it does not appear to represent the actual judgment of the Supreme Court.

*Stuart v. Mott* (1894), 23 S.C.R. 153 and 384, was an appeal from Nova Scotia, where the plaintiff at first sought specific performance of an agreement, not in writing, by the defendant, to the effect that, for valuable consideration rendered, he would give the plaintiff a one-eighth interest in a gold mine. This failed by reason of the bar of the Statute of Frauds, as being a contract relating to an interest in land. In the trial, however, the defendant admitted that he had agreed to give the plaintiff one-eighth of his interest in the proceeds of the mine when sold, and upon this aspect of the agreement the plaintiff brought another suit for the money to a successful conclusion. It was again raised and argued that the Statute of Frauds was a defence, but Chief Justice Strong held that the contract for a share of the proceeds was not one for an interest in land, within the statute.

In his analysis of the contract sued on, the Chief Justice

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said that "it was one exclusively relating to an interest in money; it was true the money was to arise from the sale of land (i.e., a mining interest), but that, on authority, can, I conceive, make no difference after the land has been actually sold. It is not sought to enforce any trust or contract to sell the land . . . ; the sale has taken place, and the only question is as to a share of the price received" (p. 388).

The learned Chief Justice cites only American cases, with a reference in a foot-note to one English case, *Smith v. Watson* (1824), 2 B. & C. 401, the point of which is that a person entitled to share in profits has no interest in the property out of which the profits may arise.

I would refer to the language of Buller, J., in an old case of *Poulter v. Killingbeck*. A. agreed with B. to let him have land rent-free on condition that A. should have a moiety of the crops. While crops were in the ground, the value was by consent appraised, and, the defendant having refused to pay half the value, an action was brought for the amount. On the Statute of Frauds being pleaded, Buller, J., said that the agreement did not relate to any interest in the land, which remained altogether unaltered by the arrangement concerning the crops: *Poulter v. Killingbeck* (1799), 1 B. & P. 397.

That decision is explained by Lord Ellenborough in *Crosby v. Wadsworth* (1805), 6 East 602, 612: the bargain was originally an agreement to render in lieu of rent part of a severed crop, in that shape merely a chattel, and by subsequent agreement it was changed into money, instead of remaining as a specific render of produce.

That is the test which may be applied to this case: the agreement is that, in consideration of the abandonment of the proceedings to set aside the tender, the defendant was, upon and after sale of the land, to recoup himself his outlay and pay over the residue of the proceeds of sale to the plaintiff. No land or interest in land was involved, but merely the money which would result from a sale of the land. There was no trust impressed upon the land, and the purchaser was not bound to sell at all, but, when he did sell it, his promise was, for good consideration, to pay the profits to the plaintiff. The money, doubt-

less, was derived from the sale of land, but the bargain was about the money alone, and may well stand outside of the Statute of Frauds.

The plaintiff's right of action arose upon and after the sale at \$3,000. From the evidence it appears that the defendant expected to sell at an advance almost contemporaneously, but the lapse of time does not affect the real situation.

The apparent profit was \$900, and for this the plaintiff was and is willing to accept judgment.

If the defendant is dissatisfied with this figure and thinks it can be reduced, he is at liberty to do so by a reference to the Master. If the parties cannot agree after disclosure of what the defendant has received for rents and profits and what he has expended, with interest properly allowable—if after such discovery the parties cannot settle the amount—it will be referred to the Master to fix the sum payable under this judgment, and he will also deal with and dispose of the costs of the reference.

Meanwhile judgment is for the plaintiff with costs of action. The \$900, or whatever sum is found by the Master, is to be applied first in the payment of what is owing to the lien-holders (three in number), in order of priority, upon the principal money, and thereafter any surplus to be applied in payment of interest upon the amount of such liens according to priority.

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[BOYD, C.]

RE HISLOP AND STRATFORD PARK BOARD.

*Municipal Corporations—Expropriation of Land by Public Parks Board—Arbitration as to Amount of Compensation—Award—Appeal—Interest Costs—Possession—Public Parks Act, R.S.O. 1914, ch. 203, sec. 17—Municipal Act, R.S.O. 1914, ch. 192, secs. 344, 347.*

The effect of sec. 347 of the Municipal Act, R.S.O. 1914, ch. 192, incorporated in the Public Parks Act, R.S.O. 1914 ch. 203, by sec. 17 of that Act, is, that where the arbitration is only as to the amount of compensation, and the expropriating by-law does not authorise permanent entry on the land, the award as to amount does not become binding on the expropriating body—the Public Parks Board—unless adopted by by-law within three months after the making of the award; and where possession of the land has not been taken by the Board, and no provision is made in the

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by-law for entry upon the land under the award, interest should not be allowed to the claimant land-owner upon the sum awarded for the value of the land.

*Re Macpherson and City of Toronto* (1895), 26 O.R. 558, distinguished. Section 344 of the Municipal Act—also incorporated in the Public Parks Act—enables the arbitrators to award costs as a fixed sum or on the scale of the Courts. Under this, the arbitrators have a discretion which they can exercise by disallowing costs. An appeal by the claimants from an award of \$1,400 without interest and without costs was dismissed.

APPEAL by Elizabeth and Margaret Hislop from an award of three arbitrators fixing at \$1,400 the compensation to be paid by the Board to the appellants for land expropriated by the Board for park purposes, and directing that each party should pay half the arbitrators' fees, and that there should be no costs of the arbitration to either party.

The appeal was on three grounds: (1) that the compensation awarded was insufficient; (2) that costs should have been awarded to the appellants; and (3) that interest should have been allowed on the amount awarded for the value of the land taken, \$1,200.

May 12. The appeal was heard by BOYD, C., in the Weekly Court at Toronto.

*T. Hislop*, for the appellants.

*R. S. Robertson*, for the Board.

May 13. BOYD, C.:—The by-law for the extension of the park system in Stratford provides that certain lands, being parts of lots 25 and 26 according to McPherson's survey and part of park lots Nos. 428 and 429 according to the description set forth, be expropriated. An award made by three arbitrators, dated the 20th April, 1915, finds that the total amount of compensation is \$1,400, and directs that each party shall pay half the arbitrators' fees, and does not allow costs to either party.

Appeal is by the owners, on the ground that the compensation is insufficient, and that costs should have been given to the owners, and also interest allowed on the amount awarded for the value of the land, \$1,200.

To take the last point first. Possession of the land has not been taken by the Board, and no provision is made in the by-law

for entry upon the land under the award. The possession of the owners has been undisturbed, and may not be disturbed unless the Park Board determines to adopt the award within the time limited by the statute: I refer to sec. 347\* of the Municipal Act, R.S.O. 1914, ch. 192, incorporated in the Public Parks Act, R.S.O. 1914, ch. 203, by sec. 17 of that Act. The effect is, that where the arbitration is only as to the amount of compensation, and the by-law does not authorise permanent entry on the land, the award as to amount does not become binding on the Board unless adopted by by-law within three months after the making of the award.

Having regard to the relative situations of the parties as to the enjoyment of the land, the cases as to payment of interest on the sum awarded from the date of the by-law do not appear to be applicable. The leading case as to interest on the sum awarded is *Re Macpherson and City of Toronto* (1895), 26 O.R. 558. But interest was given because the effect of the by-law was to vest immediately in the corporation the property expropriated, and, because the land was then taken possession of, an equivalent by way of interest was allowed to the owner. But where the effect of the by-law and arbitration is only to give an option to take the land at the amount awarded, the land itself is not taken or interfered with until the by-law is adopted by a further act of the Board. This is not a case in which the appellants are entitled to interest on the amount of the award, as matters now stand.

Neither should there be any interference on the question of costs unless some material variation is to be made in the amount

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\*347. Where the arbitration is as to compensation, if the expropriating by-law did not authorise or profess to authorise any entry on or use to be made of the land before the award, except for the purpose of survey, or if the by-law gave or professed to give such authority, but the arbitrators by their award find that it was not acted upon, the award shall not be binding on the corporation, unless it is adopted by by-law, within three months after the making of the award; and if it is not so adopted, the expropriating by-law shall be deemed to be repealed, and the corporation shall pay the costs between solicitor and client of the reference and award, and shall also pay to the owner the damages, if any, sustained by him in consequence of the passing of the by-law, and such damages if not mutually agreed upon shall be determined by arbitration.

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awarded. The statute—sec. 344\* of the Municipal Act—enables the arbitrators to award costs as a fixed sum or on the scale of the Courts. This is manifestly a discretionary power, which they can well exercise by disallowing costs. The ground of decision as to this was, no doubt, the great discrepancy between what was claimed, \$5,000, and the sum awarded for the land.

And upon this head of appeal—on the merits—I can find no good ground on which to reverse or to increase the amount. It was evidently a special kind of land, in part low-lying, in part wet and marshy—difficult of access—and but a small portion available for building on. The evidence is greatly divergent as to values and as to opinions of potential values—the arbitrators, who well knew the place and viewed it, struck what seems to be a reasonable mean between the extremes. I cannot doubt that the reclamation of this strip of land on the water front for park purposes will add to the amenity of the prospect and to the value of the lands retained by the proprietor.

There is great doubt in my mind whether the right of the owners is made out to fix the limit of their land as at the present water's edge. Many changes have been made by digging out the bed and by making dykes along the edge of the stream as it was originally, which render it difficult to define the boundaries upon the evidence before me. The high values placed on the place by the claimants' witnesses are based upon what is likely to be the value if certain local improvements were made, which may or may not follow the acquisition of the land for park purposes; but in its present situation I should deem the land to be practically unsaleable.

I cannot, after reading and considering the evidence and all the plans etc. put in, find any tenable and satisfactory ground to disturb the conclusions of the arbitrators.

I dismiss the appeal with costs.

\*344.—(1) The arbitrators may award a fixed sum for costs or may award costs on the scale of the Supreme Court, or of the County Court, in which case they shall be taxed by the proper officer of the Court in the county or district in which the first meeting of the arbitrators was held, without any further order, and the amount shall be payable within one week after it is finally determined.

## [APPELLATE DIVISION.]

TORONTO GENERAL TRUSTS CORPORATION V. GORDON MACKAY &  
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*Contract—Construction—Sale of Stock and Assets of Commercial Company—Ascertainment of Amount Payable—Correspondence between Solicitors—Modification—New Contract—Estoppel.*

*Held*, reversing the judgment of MIDDLETON, J., 33 O.L.R. 183, that the meaning of clause 5 of the agreement in question was not doubtful or ambiguous; that neither the subsequent correspondence between the solicitors nor the transactions in or by the company could modify the plain contract or substitute a new contract in its place; that there was nothing upon which an estoppel could be founded; and that the plaintiffs were entitled to recover the amount claimed by them.

APPEAL by the plaintiffs from the judgment of MIDDLETON, J., 33 O.L.R. 183.\*

May 14. The appeal was heard by MACLAREN, J.A., RIDDELL, LATCHFORD, and KELLY, JJ.

*C. J. Holman*, K.C., and *J. D. Bissett*, for the appellants, contended that upon the proper construction of the agreement of the 16th February, 1912, made by the plaintiffs' testator with the defendants, the plaintiffs were entitled to recover a balance of \$10,000, and there was no new contract and no estoppel. They referred to *McKenzie v. Duke of Devonshire*, [1896] A.C. 400, at p. 408; *Orr v. Mitchell*, [1893] A.C. 238, 254; *Young v. Smith* (1865), L.R. 1 Eq. 180, 183; *Inglis v. Buttery* (1878), 3 App. Cas. 572; *Lord Hastings v. North Eastern R.W. Co.*, [1899] 1 Ch. 656, 663; *S.C.*, *sub nom. North Eastern R.W. Co. v. Lord Hastings*, [1900] A.C. 260.

*I. F. Hellmuth*, K.C., and *J. H. Fraser*, for the defendants, respondents, contended that the meaning of the agreement was not clear, and that the construction which the parties had put upon it in the correspondence should be adopted, or the finding of a new contract or an estoppel affirmed.

May 15. The judgment of the Court was delivered by RIDDELL, J.:—The late Joseph Mickleborough, on the 16th Feb-

\*In the report, at p. 189, there is a mistake as to the year in which Mr. Glenn and Mr. McIntyre died. Both deaths occurred in 1913—not 1914.



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February, 1912, made an agreement with the defendants, a copy of which I attach hereto.\* He died on the 26th November, 1912, and the plaintiffs are the executors of his last will and testament.

\*MEMORANDUM OF AGREEMENT made in duplicate this 16th day of February, A.D. 1912, between Joseph Mickleborough, of the city of St. Thomas, in the county of Elgin, merchant, of the first part, and Gordon Mackay & Company Limited, of the city of Toronto, in the county of York, of the second part.

Whereas the said Joseph Mickleborough is a large shareholder in the mercantile corporation carrying on business at the city of St. Thomas, known as J. Mickleborough Limited, and in addition to his own holdings controls or is able to assure the disposition of the balance of the shares of the said company,

And whereas the said Joseph Mickleborough is desirous of disposing of the said company and his interest therein to Gordon Mackay & Company Limited, or their nominees, and the said Gordon Mackay & Company Limited are willing to purchase the said company on the basis of its having paid-up capital of \$50,000 and assets, after handing over the book-debts as mentioned in paragraph 8 and after making payments of \$1,000 a month referred to in paragraph 5, of not less than the said amount of \$50,000, as ascertained on the basis provided in paragraphs 2 and 3, and to pay for the said shares as hereinafter set out.

Now therefore the parties hereto mutually agree together as follows:—

1. Except the shares hereinafter mentioned, the said assets for the purpose of carrying out this transaction are to consist of stock in trade and fixtures only.

2. The fixtures shall be taken and valued at \$5,000 net, and include all fixtures in the premises except the heating appliances.

3. Stock of the goods, wares and merchandise is to be retaken on the basis of the old stock list, which was completed on or about the 19th day of January, 1912, where prices on such list do not exceed cost, and otherwise at cost, to be paid for at the rate of 85 cents on the dollar of the net amount thereof, according to the stock lists to be retaken, which retaking the purchaser desires, but it is distinctly understood that the purchaser is to pay the expense of employees for one week in retaking the stock, and purchaser shall be entitled to be represented at the stock-taking.

4. The said Joseph Mickleborough will forthwith pay all the liabilities of the said company down to the 1st day of March, 1912.

5. The said Gordon Mackay & Company Limited will pay the said Joseph Mickleborough for the said shares an amount equal to the value of the said goods, wares and merchandise and fixtures ascertained as herein provided as follows: \$20,000 by converting 200 of the said shares into first preference shares bearing dividends to be guaranteed by Gordon Mackay & Company Limited, at the rate of 6 per cent. per annum payable half-yearly, computed from the 1st day of March, 1912, such shares to be redeemable at par within five years from the 1st day of March, 1912, and the purchaser shall be bound to redeem such shares not later than five years and not to carry any voting power or such voting power to be exercised by Gordon Mackay & Company Limited, as they may elect: \$20,000 in cash and balance in monthly sums of \$1,000 each, with interest on the balances remaining unpaid at 6 per cent. per annum payable half-yearly, computed from said date.

6. Upon payment of the said \$20,000 in cash to the said Joseph Mickleborough, the latter undertakes to secure the transfer of 500 shares of the paid-up capital held by himself and others, being all the issued capital stock of said company, to the said Gordon Mackay & Company Limited, and the latter shall immediately thereafter procure the issue of the said 200 preference shares and deliver the same to the said Joseph Mickleborough.

The sole question at issue in this action is the true interpretation of clause No. 5 of the agreement.

Admittedly the "basis" of the agreement, as referred to in the second recital, is existent—there was \$50,000 paid of stock and more than \$50,000 worth of assets.

I do not think it at all doubtful or ambiguous what the meaning of clause No. 5 is—the stock in trade is to be taken and

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7. All moneys payable under this agreement shall bear interest at the rate of 6 per cent. per annum from the 1st day of March, 1912, and the payment thereof shall be guaranteed by the said Gordon Mackay & Company Limited.

8. The said Joseph Mickleborough shall be entitled to the whole of the book-debts belonging to the said J. Mickleborough Limited, which are not intended to be included in this transaction.

9. All insurance premiums and telephone rentals shall be apportioned as of the 1st day of March, 1912, and the value of the unexpired portion thereof shall be immediately payable to the said Joseph Mickleborough.

10. The said Gordon Mackay & Company Limited shall take over all import goods which have come in or shall come in as spring purchases as made by the J. Mickleborough Limited for the spring of 1912, and also all Canadian goods purchased for the spring of 1912, and shall pay the said Joseph Mickleborough for the same at invoice prices plus freight and duty, and the latter shall also pay the said Joseph Mickleborough for all fuel on hand at the said date.

11. And it is a condition precedent to this contract that the said Joseph Mickleborough will grant to J. Mickleborough Limited a lease of the premises at present occupied by the said J. Mickleborough Limited for a period of five years from the 1st day of March, 1912, with an option to renew such lease for a period of five years further at the same rental, namely, a yearly rental of \$3,000 per annum, the lessees to pay the taxes and to insure the plate glass at their own expense, the rental under the said lease to be paid quarterly, the said Joseph Mickleborough agreeing, during the currency of the said lease or the renewal of it above provided for, to keep the outside of the building painted and in good repair, including the roof and heating plant, and the said lease shall provide that the said lessees may assign or sublet, provided no business shall be carried on in the premises that will be damaging to them. The said lease shall be made in pursuance of the Short Forms of Leases Act, and shall contain all the statutory covenants including the statutory covenant to pay rent and to pay taxes, except in so far as they are varied by this clause. The said lease shall also contain a covenant on the part of the lessor by which the lessees may erect an elevator in the building upon the said premises at their own expense, and in the event of erecting such elevator the lessor shall, at the end of the said term or renewal term, upon the lessees giving up possession of the premises, pay the lessees the value of the said elevator, to be determined, in case the parties cannot agree, by arbitration. Each party to choose an arbitrator and the two so chosen to choose a third, and the valuation so made by the said arbitrators or a majority of them shall be final and conclusive upon the said parties.

12. The purchasers shall take control and possession of the premises on the 1st day of March, A.D. 1912.

13. And it is expressly agreed that all the terms, advantages, benefits, and obligations herein provided for shall extend to the heirs, executors, administrators, successors, and assigns of the parties hereto respectively.

(Signed and sealed by the parties.)

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valued, 85 per cent. of that valuation is taken as part of the amount to be paid: add to that the \$5,000 at which the fixtures are to be valued under clause No. 2 and the amount found under clause No. 9. The sum of these is the purchase-price: payable \$20,000 in stock guaranteed by the defendants, \$20,000 cash, and the remainder \$1,000 per month.

I am unable to see how the subsequent correspondence between the solicitors or the transactions in or by the company can be said to modify this plain contract or to substitute a new contract in its place. If for no other reason, Mr. Glenn is not shewn to have had authority to modify the contract or make a new one.

Nor is there anything upon which an estoppel can be founded.

I am of opinion that the appeal should be allowed and judgment entered for the plaintiffs with costs here and below.

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[APPELLATE DIVISION.]

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May 18.

DALE V. TORONTO R.W. CO.

*Trial—Jury—Address of Counsel—Objectionable Language—Objection not Taken at Trial—Waiver—Verdict—Motion for New Trial—Costs.*

Where counsel for the plaintiff in addressing the jury (in an action brought against a street railway company to recover damages for injuries sustained by a woman-passenger by reason of the company's negligence) used language which the Court considered inflammatory and objectionable, but no objection was taken at the trial, the evidence was fully discussed by the same counsel, the trial Judge did not see fit to interfere, and the verdict (in favour of the plaintiff) was not unsatisfactory, the Court refused the defendants' motion for a new trial, but, in order to shew disapprobation of the language employed, without costs.

*Sornberger v. Canadian Pacific R.W. Co. (1897), 24 A.R. 263, referred to.*

APPEAL by the defendants from the judgment of DENTON, Jun.Co.C.J., in favour of the plaintiff, upon the findings of a jury, in an action brought in the County Court of the County of York, to recover damages for injuries sustained by the plaintiff by being thrown from the step of one of the defendants' street-cars, in operation upon the streets of the city of Toronto, by its being negligently started with a jerk, as she alleged, when she was about to alight. The jury accepted the plaintiff's account

of the occurrence, as against that of the defendants, which was that she got off voluntarily while the car was in motion; the jury also found that there was no contributory negligence on her part; and they assessed damages at \$925, for which amount judgment was entered in her favour in the County Court.

The defendants asked for a new trial, upon affidavits stating that the language used by the plaintiff's counsel in addressing the jury at the trial was improper and inflammatory; these affidavits were answered by affidavits filed by the plaintiff.

May 14. The appeal was heard by RIDDELL, LATCHFORD, MIDDLETON, and KELLY, JJ.

*D. L. McCarthy*, K.C., for the appellants.

*N. F. Davidson*, K.C., for the plaintiff, the respondent.

The substance of the arguments is stated in the judgment. *Sornberger v. Canadian Pacific R.W. Co.* (1897), 24 A.R. 263, was referred to by both counsel.

May 18. RIDDELL, J.:—An appeal from the judgment of the County Court of the county of York.

The plaintiff was seriously injured by being thrown down on the pavement from a car of the Toronto Railway Company. Her story, which is accepted by the jury, is, that the car was negligently started "with a jerk" as she was in the act of alighting—the jury have also found that there was no contributory negligence on her part. Damages were assessed at \$925—a somewhat large sum, but not excessive in view of the serious nature of the plaintiff's injuries.

The defendants admit that they would have no hope of succeeding in the appeal if the case had been properly conducted at the trial. But they say that the whole address of the plaintiff's counsel "consisted of an impassioned abuse of the defendant company and its treatment of the public, in addition to a reference to the house of the Baron on the hill;" that he "entirely confined himself to an appeal to the sympathy of the jury on behalf of 'this poor unfortunate plaintiff,' picturing her on the one side and this wealthy octopus corporation on the other." So says the claims-agent of the railway company, in

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his affidavit. A student-at-law swears that counsel "on behalf of the plaintiff referred to the defendants as a huge octopus having a stranglehold on the people, spreading its tentacles over the city, gathering in the nickels from the poor working people," etc., etc.

The plaintiff files a number of affidavits: the allegation that the defendants were referred to as "a wealthy octopus corporation" is specifically denied; and several deponents, including the counsel himself, consider the address a fair one. The use of the words "octopus and stranglehold" is admitted: and this is what is said by counsel himself:—

"12. In the introduction to my address, I had in mind that the company's explanation of the accident was more remarkable than a fairy story.

"13. I accordingly, at the very beginning, before going into the evidence, outlined an imaginary fairy story of a giant named "Stranglehold," who had his castle on a hill, to whom his subjects had to pay a silver toll for being carried through the city, and that his tentacles were spread over the city, and that one day a woman travelling in one of the carriages was frightened by the apparition of the giant and threw herself off the carriage, but the giant, repenting, held her up as she fell so that her hands were not bruised and she fell straight out from the carriage.

"14. It was in this portion of my address that the words "octopus" and "stranglehold" were used, and I say that during this portion of my address jurymen were smiling, and I was glad when I could get through what I was compelled to finish because I had started it, and I was able to proceed to the serious examination of the evidence."

He does not say that he had not in mind when telling this "fairy story" the Toronto Railway Company and a gentleman very generally identified with it, who has his residence "on the hill," nor does he say that he did not intend and expect that the Toronto Railway Company and that well-known gentleman would at once be recognised under the allegory. Probably he would agree that it would shew quite too much *naïveté*—guilelessness—for any one who lives in Toronto or its vicinity, or

even who reads the Toronto newspapers, not at once to identify that "Giant named 'Stranglehold' . . . to whom his subjects had to pay a silver toll for being carried through the city."

The trial Judge found no difficulty in doing so: in his charge he says: (Counsel) "has made a very impassioned appeal to you on behalf of this woman, and I would be sorry to say anything that would detract from the effect of that appeal; but, gentlemen, you must bear in mind that you have in these cases to go by the weight of the evidence you hear. If the truth be on this evidence that this woman stepped off that car before it came to a standstill, when it was in motion, it does not make a particle of difference whether the street railway company is an octopus or stranglehold or anything of that sort; does not make a bit of difference what they are if, in fact, the truth be on the evidence that she stepped off in that way."

But the learned Judge does not at all support the allegations of the defendants' deponents that the evidence was not discussed: he says in his charge (to which no objection was taken): "Now then, what is the truth about it? I am not going to refer to this evidence in any detail at all; counsel for the plaintiff has gone into that in detail."

No objection was taken by the defendants to the address of counsel (in this regard): the trial Judge was not asked to interfere; and the first time any point is sought to be made of the alleged misconduct of counsel is on this appeal.

The facts then, as I see them, are that counsel for the plaintiff (1) "made a very impassioned appeal . . . on behalf of" his client, (2) and referred in an allegorical but unmistakable way to the defendant railway company as a "Giant called Stranglehold . . . whose subjects had to pay him a silver toll" and whose "tentacles were spread over the city;" that (3) no objection was taken to these remarks; (4) the counsel discussed the evidence fully and in such a way that the trial Judge did not find it necessary to refer to it in any detail; (5) the verdict is not unsatisfactory.

As to the first: counsel has the right to make an impassioned address on behalf of his client—nay, in no few cases it may be

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a duty to make an impassioned address—mere earnestness, fervour or even passion, is not in itself objectionable—so long as counsel does not transgress the decorum which should be observed in His Majesty's Court and does not offend in other respects—and Courts do and must give considerable latitude even to extravagant declamation.

That the plaintiff was (if she was) described as a "poor unfortunate" person, and sympathy claimed for her as such, is one of the commonest tricks of advocacy, in bad taste perhaps, but not ground for a new trial if standing by itself: *Dowdell v. Wilcox* (1884), 64 Iowa 721, 724; *Baker v. City of Madison* (1885), 62 Wis. 137, 147. The trial Judge should stop this kind of thing when carried too far: but a jury trial is a fight and not an afternoon tea.

"To rigidly require counsel to confine themselves directly to the evidence would be a delicate task, both for the trial and the appellate courts, and it is far better to commit something to the discretion of the trial court than to attempt to lay down or enforce a general rule defining the precise limits of the argument. If counsel make material statements outside of the evidence which are likely to do" the opposite party "injury, it should be deemed an abuse of discretion . . .; but where the statement is . . . of a character not likely to prejudice the cause . . . in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal:" *Combs v. The State* (1881), 75 Ind. 215.

The allegorical statements are wholly objectionable from any point of view, taste (although indeed *de gustibus non est disputandum*), ethics, law. The trial Judge, if he thought proper, would have been justified, *proprio motu*, in stopping counsel and administering a stern rebuke. This course, however, or any other must, within reasonably wide limits, be in the discretion of the trial Judge: he sees the jury, sees and hears the counsel, is fully cognizant of the whole atmosphere of the case—all, advantages we do not enjoy. But counsel for the opposite party has also a duty—he should, if he thinks the remarks injurious

to his client, object openly and at once. He may think that what is said, designed as it is to hurt his client, is really having a contrary effect—and in many (I believe most) cases he will be right in so thinking—jurymen are not the compounds of ignorance, weakness and prejudice they are sometimes supposed to be; and in many cases in my own observation, I am confident that unfair argument and “mud-slinging” hurt rather than helped those who indulged in them. If counsel says nothing, but allows the objectionable address to proceed without interruption, he should *primâ facie* be considered as waiving all objection and taking his chances of a favourable verdict—so that it will be too late to raise the objection as a ground of a motion for a new trial. This is in substance what was said in the Court of Appeal in *Sornberger v. Canadian Pacific R.W. Co.* (1897), 24 A.R. 263, after a very able and complete argument.

I do not at all say that cases may not arise in which, notwithstanding the omission of counsel to object, an appellate Court will grant a new trial—but these cases must be exceptional, and some injustice must be either apparent or strongly suspected. Nothing of that kind is present here: the evidence was fully discussed, and there does not seem to be any reason for suspecting injustice.

We should, I think, dismiss this appeal: but, to shew our disapprobation of the language employed by the plaintiff's counsel, refuse costs.

I should add a general observation:—the mischievous practice of some counsel—few in number as I hope and believe they are—of employing inflammatory language in addressing juries, should be checked—it is an abuse of the privileges of counsel, and, if persisted in, a contempt of Court. More than one Judge has, in such cases, discharged the jury and dealt with the case alone. This course is in many cases eminently advisable: and, if it were unflinchingly and pitilessly followed, it would be effective in putting an end, in most instances, to the impropriety—if counsel knew that an unfair presentation to the jury would prevent the jury being allowed to pass upon his case, he would be careful not to transgress—unless he were a fool: there is no known cure for that.

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I am not to be taken as disapproving the conduct of the trial Judge here: no doubt, he did not consider that the rhetoric of counsel had any evil influence on the jury.

LATCHFORD, MIDDLETON, and KELLY, JJ., agreed in the result.

*Appeal dismissed without costs.*

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[APPELLATE DIVISION.]

April 28.  
May 18.

PARSONS v. TOWNSHIP OF EASTNOR.

*Arbitration and Award—Motion to Set aside Award—Claim under Municipal Drainage Act, R.S.O. 1914, ch. 198, sec. 80—Notice—Damages—Mistake in Law of Arbitrator—Written Reasons Accompanying Award—Error on Face of Award—Jurisdiction to Set aside.*

It is the duty of the Court to set aside an award where an error in law appears on the face of the award; and, where the arbitrator gives his reasons in a memorandum accompanying the award, error in law may be shewn by reference to these reasons.

Review of the authorities.

*Kent v. Elstob* (1802), 3 East 18, approved and followed.

The plaintiff complained of injury to his land by reason of drains constructed by the defendants, a township corporation, and commenced proceedings under the provisions of the Municipal Drainage Act, R.S.O. 1914, ch. 198, by a notice in which claims were made for original malconstruction of the drains and also for negligent up-keep or "nonrepair." Section 80 (2) of the Act provides that the municipality shall not be liable for nonrepair unless and until the service of notice. The parties submitted their differences, based upon these claims, to arbitration, and the arbitrator made an award to the effect that the plaintiff was entitled only to such damages as he sustained after service of the notice, and that after the date of service he sustained no damages whatever:—*Held*, that there was error in law upon the face of the award: the plaintiff had a right to complain of original malconstruction; and the damages, if any, accruing to him before the service of the notice under sec. 90, must be determined and not passed over as not allowed by the law; and the award should be set aside.

Judgment of HODGINS, J.A., reversed.

MOTION by the plaintiff to set aside an award.

April 21. The motion was heard by HODGINS, J.A., in the Weekly Court at Toronto.

G. H. Kilmer, K.C., and D. Robertson, K.C., for the plaintiff.  
W. H. Wright, for the defendants.

April 28. HODGINS, J.A.:—This is a motion to set aside the award of His Honour the late Judge Barrett, who was appointed

sole arbitrator by agreement of reference dated the 30th September, 1913; and, if necessary, to extend the time for moving.

The plaintiff began proceedings under the Municipal Drainage Act, and served notice of his claim. He thereafter agreed with the respondents that further proceedings before the Drainage Referee thereon should be stayed, and that the plaintiff's claim and all matters of dispute between the parties should be referred to the determination and award of Judge Barrett. Accordingly, an agreement of reference was signed, giving the usual powers to the arbitrator, and authorising him to direct the defendants to do the work as he might deem proper, and to order the issue of a mandamus or injunction if necessary.

There is no provision for appeal in the agreement of reference. Pursuant thereto, the late Judge Barrett made an award on the 6th day of January, 1915, which contained this paragraph: "The said Parsons is entitled to such damages only which he sustained after having served the said notice on or about the 28th day of June, 1913, and that after that date he sustained no damage whatever."

In the argument before me, counsel for the plaintiff rested his case upon two points: (1) that there was a mistake in law on the face of the award; and (2) that there was a plain mistake of fact.

The mistake of fact alleged is that the learned arbitrator held that whatever damages had accrued were caused by nonrepair, whereas they were, it was contended, caused by improper construction and the maintenance, in that condition, of the drains. The matter of law in which he is said to have gone wrong is his holding that under sub-sec. 2 of sec. 80 of the Municipal Drainage Act, R.S.O. 1914, ch. 198, the damages were limited to those sustained after the service of the notice on the 28th day of June, 1913.

In support of these objections, reference was made to the reasons for judgment given by the learned arbitrator, which, it was said, must be taken to form part of his award.

The cases referred to on the argument by the plaintiff in support of that contention are all based upon the fact that the arbitrator's reasons were to be found in a paper delivered with the

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award and both in the opinion of the Court to be taken as one instrument. This is expressly stated in *Kent v. Elstob* (1802), 3 East 18, and *Leggo v. Young* (1855), 16 C.B. 626; and, in explaining these cases, in *Holgate v. Killick* (1861), 7 H. & N. 418. These cases are consistent with and founded upon decisions which are collected in the later cases of *Dinn v. Blake* (1875), L.R. 10 C.P. 388; *In re Keighley Maxsted & Co. and Durant & Co.*, [1893] 1 Q.B. 405; *McRae v. Lemay* (1890), 18 S.C.R. 280; *Re Laidlaw and Campbellford Lake Ontario and Western R.W. Co.* (1914), 31 O.L.R. 209.

Under these later cases it is quite impossible, I think, to contend that reasons which may be written out by an arbitrator become part of the award or are incorporated with it to such an extent as to permit the Court to treat error appearing therein, of fact or of law, as entitling the Court to set aside the award. The modern practice of giving reasons by arbitrators is useful in so far as it permits the parties to ascertain the grounds for the decision, and satisfies them that points have not been overlooked. But they form no part of the award and cannot be acted upon in a motion to set it aside. Reasons are looked at in cases in which the Court is entitled, as under the Municipal and Railway Acts, to go into the merits and to alter or vary the award, or remit the matter to the arbitrator, because it is valuable to see upon what principle the arbitrator has proceeded.

But in any case the mistake of fact alleged by the plaintiff to have been made, is one which cannot be arrived at without going into the merits, a course which is not open to me on this motion: *Lancaster v. Hemington* (1835), 4 A. & E. 345; *Phillips v. Evans* (1843), 12 M. & W. 309.

The so-called mistake in law is in applying the provisions of sec. 80 to the claim of the plaintiff. If the learned arbitrator was right upon his facts, then there was no error in law, so far as I am able to judge; but my present decision proceeds wholly upon the ground that I am without jurisdiction to set aside the award in this case, as I can find nothing on the face of the award shewing mistake in fact or in law; and, if I did, there is nothing before me to indicate that the learned arbitrator was

aware of the mistake and desired to have it corrected. The importance of this is pointed out in the *Laidlaw* case (*ante*).

I think the case falls within the rule that the parties, having chosen their own tribunal, are bound, for better or for worse, by its decision both on the facts and the law.

The motion must be dismissed with costs.

The plaintiff appealed from the order of HODGINS, J.A., dismissing the motion to set aside the award.

May 13 and 14. The appeal was heard by RIDDELL, LATCHFORD, MIDDLETON, and KELLY, JJ.

G. H. K  lmer, K.C., for the appellant, contended that the reasons of the arbitrator formed part of the award, and could be referred to for the purpose of shewing that there was error. He referred to *Kent v. Elstob*, 3 East 18, 6 R.R. 520; Halsbury's Laws of England, vol. 1, p. 479; *Holgate v. K  llick*, 7 H. & N. 418; *Hodgkinson v. Fernie* (1857), 3 C.B.N.S. 189, at p. 202, referred to in *McRae v. Lemay*, 18 S.C.R. 280. *In re Keighley Marsted & Co. and Durant & Co.*, [1893] 1 Q.B. 405, is distinguishable. On the merits, the arbitrator was wrong in law, and his award should be set aside.

W. H. Wright, for the defendants, contended that the reasons of the arbitrator could not be looked at. He referred to *Re Laidlaw and Campbellford Lake Ontario and Western R.W. Co.*, 31 O.L.R. 209; *Doe dem. Oxenden v. Cropper* (1839), 10 A. & E. 197, 50 R.R. 378; *Dinn v. Blake*, L.R. 10 C.P. 388; *Re Grand Trunk Railway of Canada and Petrie* (1901), 2 O.L.R. 284; *In re King and Duveen*, [1913] 2 K.B. 32. No error appeared on the face of the award; and, even if the reasons were looked at, there was no ground for setting aside the award.

May 18. RIDDELL, J.:—This is an appeal by Parsons from the judgment of Mr. Justice Hodgins of the 28th April, in which he refused to set aside an award made by His Honour Judge Barrett (now deceased).

The facts in the case before the arbitration was had appear from the submission dated the 30th September, 1913. The recitals are as follow:—

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“Whereas the Municipal Council of the said Township of Eastnor, under the provisions of the Municipal Drainage Act, on the 11th day of October, 1902, passed a by-law to provide for certain drainage work therein described and known as Fern Creek Drainage Scheme, and also constructed an addition thereto or variation thereof known as the Angle Ditch.

“And whereas the said municipal council, on the 21st day of March, 1906, passed another by-law to authorise the said corporation to issue certain debentures to defray the cost of and to repay loans and advances in respect of said Fern Creek Drainage Scheme.

“And whereas the party of the first part claims to be the owner of lands affected by the said drainage scheme, against which lands a special rate for the construction of the said work is rated and charged.

“And whereas the said party of the first part has commenced proceedings under the provisions of the Municipal Drainage Act, and has served notice of claim on the parties of the second part, claiming:—

“(a) That the said drainage works have never been completed in accordance with the reports of the engineers, on which the said by-laws for the construction of the said works were passed;

“(b) That the said drains, after construction, were allowed to get into a very bad state of repair, and remained out of repair for a long time and are still out of repair;

“(c) That the parties of the second part have constructed other ditches emptying into said Fern Creek drain, and have deepened and widened said drain above the lands of the party of the first part, and have brought water on to the lands of the party of the first part, which the said drain cannot carry away;

“(d) That the parties of the second part have never provided a proper and sufficient outlet for the water brought to the lands of the party of the first part;

“(e) That the said Angle Ditch has not been excavated to the proper depth, nor to the depth required by the reports of the said engineers under which said ditch was constructed, and the said banks were not sufficiently high and strong to confine the

water brought to the lands of the party of the first part by said drain within said banks; and

“(f) That the parties of the second part have suffered and allowed said original ditch below the place where it is tapped by said Angle Ditch to become filled and obstructed, and the parties of the second part have also suffered the said ditch below the lands of the party of the first part to become obstructed by timber, rubbish, and woods, thereby checking the flow of water in same and causing water to accumulate on the lands of the party of the first part.

“And whereas it has been agreed by and between the parties hereto and it is hereby agreed that further proceedings in the Ontario Drainage Court and before the Ontario Drainage Referee shall be stayed, and that the claim of the said party of the first part and all matters in dispute between the said party of the first part and the parties of the second part shall be referred to the determination and award of William Barrett, of the town of Walkerton, Esquire, so as the said arbitrator shall make and publish his award in writing signed,” etc., etc., etc.

(It will be seen that the submission is contained in the last recital above set out.)

Under this submission the learned County Court Judge proceeded with the arbitration; and on the 6th January, 1915, made his award: “That the said Parsons is entitled to such damages only which he sustained after having served the said notice on or about the 28th day of June, 1913, and that after that date he sustained no damages whatever.”

No costs were awarded *inter partes*, and each party was ordered to pay half the stenographer's fees, etc., etc.

A motion by Parsons to set aside the award was refused by my brother Hodgins; and Parsons now appeals.

Much argument took place before us on the question whether - “reasons” for the award, delivered in the same envelope with the award, can be considered so much a part of the award as to entitle the Court to look at them. In my view, it is not necessary here to decide this point—but I am not to be taken as holding or considering that *Kent v. Elstob*, 3 East 18, is not good law.

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Here the error in law, of any, is apparent on the face of the award—it is held as a matter of law that Parsons is not entitled to damages sustained before the service of his notice. If we are at liberty to look at the reasons, we find the arbitrator saying, “He founds his damages *principally* in the year 1912,” but that was an extraordinary season, the land dried off, and he put in his crop, but excessive rain fell thereafter. The witnesses say it was tremendous, and drowned out his crops. The engineer, McDowell, says that no system of drainage could prevent that, and the neighbours who gave evidence say that all were affected in that section in the same way, whether their lands were affected by the drains or not.

There is no finding anywhere either, (1) that there were no damages before 1912, or (2) that there were no damages in 1912 before the service of the notice. The express statement that Parsons is entitled to damages sustained only after the notice is a statement of law.

It will be seen that in the notice two distinct classes of claim are set out:—

- (1) Original malconstruction, secs. (a), (c), (d), (e).
- (2) Negligent up-keep or “nonrepair,” secs. (b), (f).

As to the second class, sec. 80 (2) of the Municipal Drainage Act, R.S.O. 1914, ch. 198, provides that the municipality whose duty it is to maintain and keep in repair a drainage work, shall not be liable “by reason of the nonrepair of such drainage work, unless and until the service . . . of notice . . . ;” there is no such provision respecting the first class.

That the first class is such as gives a right to complain is obvious—some of the cases are collected in Proctor (Drainage Acts, Ontario), pp. 171, 172—and such may be passed on by the Drainage Referee under sec. 98. The application of sec. 98(3) need not here be considered: that may be passed on by the Referee. But the damages, if any, accruing to the appellant before the service of the notice under sec. 90, must, it seems to me, be determined and not passed over as not allowed by the law.

The death of His Honour makes it, in that view of the law, impossible to do anything other than set aside the award: we, therefore, allow the appeal and set aside the award, with costs here and below.

NOTE.—I have now read the judgment of my brother Middleton, and I agree that the reasons may be read as part of the award. I would refer to the following cases, in addition to those cited: *Price v. Jones* (1828), 2 Y. & J. 114; *Jones v. Corry* (1839), 5 Bing. N.C. 187; *Mills v. Society of Bowyers* (1856), 3 K. & J. 66; *Lockwood v. Smith* (1862), 10 W.R. 628; *Williams v. Jones* (1829), 5 Man. & Ry. 3; *Wade v. Malpas* (1834), 2 Dowl. 638.

LATCHFORD, J., agreed.

MIDDLETON, J.:—I do not desire to add to what my brother Riddell has written, save to deal with one aspect of the case, which appears to me to be of practical importance. My brother Hodgins in his judgment considers that it must now be regarded as settled that reasons accompanying an award cannot be looked at upon a motion against the award.

That it is the duty of the Court to set aside an award where an error in law appears upon the face of the award cannot now be disputed, and the case of *Kent v. Elstob*, 3 East 18, determined that, where the arbitrator gives his reasons in a memorandum accompanying the award, error in law may be shewn by reference to these reasons.

Lawrence, J., there says: "It is not necessary that the arbitrator's reasons for making his award should appear upon the face of it, in order to enable the Court to examine them. Here there is no doubt what the arbitrator's reasons were, he having himself delivered them in writing to the parties, as the grounds of his decision, from whence it clearly appears that he has mistaken the law upon which he meant to proceed." And Le Blanc, J., says: "The paper in question was delivered, together with the award, by the arbitrator, as containing his reasons for coming to

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the conclusion which he did; we must therefore take them to be such, as much as if they were inserted in the award itself: and this could only have been done for the purpose of enabling any party who was dissatisfied with the award, to take the opinion of the Court upon the validity of those reasons."

In the later cases I can find nothing to shew any departure from this principle, but only a steady refusal on the part of the Court to extend the class of cases in which the award can be attacked so as to allow the alleged error to be shewn in some other way.

In *Sharman v. Bell* (1816), 5 M. & S. 504, it was sought to shew the arbitrator's opinion from his conduct and remarks during the course of the reference.

In *Leggo v. Young*, 16 C.B. 626, the umpire wrote a letter to one party stating that he would have given him his costs of the submission had empowered him. This was said to be "a very different case from" *Kent v. Elstob*, where the reasons "substantially formed part of the award and were intended so to do." A mere letter to one of the parties should not "be taken notice of, or be permitted to operate against the deliberate decision."

In *Hodgkinson v. Fernie*, 3 C.B.N.S. 189, it was attempted to shew the arbitrator's reasons by affidavits. *Kent v. Elstob* was cited and discussed. Williams, J., after referring to the general rule that the decision of the arbitrator is conclusive both on the law and the facts, adds: "The only exceptions to that rule are cases when the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award."

It is quite clear that this was not intended to modify in any way the law as laid down in *Kent v. Elstob*, but was intended to be a summing up of the law in a way which recognised that decision.

In *Hogge v. Burgess* (1858), 3 H. & N. 293, affidavit evidence was again rejected—one of the parties swore that the arbitrator had admitted his error in law—Watson, B., saying (p. 298):

"If the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, the Court will set aside the award."

*Holgate v. Kullick*, 7 H. & N. 418, was a case like *Leggo v. Young*. An arbitrator wrote a letter to one party. This, it was said, was a "contemporaneous writing;" to which Wilde, B., said (p. 419): "By 'contemporaneous writing' is meant some writing attached to and forming part of the award." Bramwell, B., says in delivering judgment (p. 419): "I am not dissenting from anything which was said in *Hogge v. Burgess*, or by the King's Bench in *Kent v. Elstob*, where it was held that a paper delivered contemporaneously with the award formed part of it. Those decisions were right upon the facts." Wilde, B., adds that the Court will not look at anything except the "award or some paper so connected with the award as to form part of it."

In *Duke of Buccleuch v. Metropolitan Board of Works* (1871), L.R. 5 H.L. 418, an attempt was made to examine the arbitrators with the view of ascertaining the grounds of their decision. After much diversity of opinion, it was held that this could not be permitted.

In *Dinn v. Blake*, L.R. 10 C.P. 388, there was an attack upon an award, based upon an affidavit shewing a statement, in conversation by the arbitrator, of his reasons. It was said this statement shewed a mistake in law. The Court in dismissing the motion said: "The Court will not, in case of a mistake, send the award back without an assurance from the arbitrator himself that he is conscious of the mistake and desires the assistance of the Court to rectify it."

All this is said of a mistake not appearing on the face of the award, and has no reference to the question now in hand. The cases were not referred to, save *Hodgkinson v. Fernie*, concerning which it is said that "the law was clearly declared in the judgment of Williams, J."

In *re Keighley Maxsted & Co. and Durant & Co.*, [1893] 1 Q.B. 405, was a motion to remit on the discovery of new evidence. Much is said as to the conclusive effect of the award, but Lord Esher recognises the exceptions and states them (p. 410):

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"Where there has been corruption or fraud, where there is a mistake of law or fact apparent on the face of the award, and where the arbitrator himself admits that he has made a mistake"—thus shewing that *Dinn v. Blake* and other similar cases have added an exception to those stated in *Hodgkinson v. Fernie*.

*McRae v. Lemay*, 18 S.C.R. 280, adds nothing. The award is conclusive and final—save in the three excepted cases stated by Sir W. J. Ritchie, C.J., in almost the same words as those just quoted—the second being "where the question of law arises on the face of the award or upon some paper accompanying and forming part of the award."

*Re Laidlaw and Campbellford Lake Ontario and Western R.W. Co.*, 31 O.L.R. 209, was an unsuccessful attempt to invoke the doctrine in *Dinn v. Blake*, failing because, while one arbitrator admitted a mistake, the other denied it.

In *Hall v. Ferguson* (1835), 4 O.S. 392, Robinson, C.J., Sherwood and Macaulay, JJ., accept *Kent v. Elstob* without question, the latter adding (p. 400): "The spirit of other cases and principles of rational justice would seem to warrant an inspection of the agreement between the parties, touching the subject-matter of the controversy, as being referred to in the paper, stating the basis and principles of the umpirage, and as indispensable to a correct understanding of those principles; beyond this (unless for the extraneous purpose of impugning the conduct of the umpire . . . ), I fear the Court is not at liberty to explore."

KELLY, J.:—I agree in the result arrived at in the judgment of my brother Riddell, and for the reasons he has stated. It is of importance, however, that some disposition should be made of the question raised in the judgment appealed from as to the propriety, on a motion attacking an award, of referring to the arbitrator's reasons accompanying the award. On the numerous authorities which I have carefully considered, I have reached the same conclusion as my brother Middleton has expressed in his judgment. The award, in my opinion, should be set aside.

*Appeal allowed.*

[MEREDITH, C.J.C.P.]

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*Constitutional Law—Marriage Act, R.S.O. 1914, ch. 148, sec. 36—Ultra Vires—British North America Act, 1867, secs. 91(26), 92(12)—Jurisdiction of Supreme Court of Ontario—Declaration of Invalidity of Marriage—Declaratory Judgment—Judicature Act, sec. 16(b)—Prior Known Decision—Reference to Appellate Division—Judicature Act, sec. 32.*

Section 36 of the Marriage Act, R.S.O. 1914, ch. 148, providing that the Supreme Court of Ontario shall have power, in certain circumstances, to declare and adjudge that a valid marriage was not effected or entered into between persons who have gone through a form of marriage, is beyond the powers of the Provincial Legislature. Under the British North America Act, 1867, "marriage and divorce" are put within the exclusive legislative powers of the Parliament of Canada (sec. 91(26)), with the exception of "the solemnisation of marriage in the Province," which is placed under the exclusive power of the Legislatures of the Provinces (sec. 92(12)); and sec. 36 of the Marriage Act does not come within the latter clause. The Supreme Court has no power under sec. 36, nor has it power otherwise, to entertain an action for a declaration that a valid marriage was not entered into between the plaintiff and defendant; and, though the Court has power, under sec. 16(b) of the Judicature Act, R.S.O. 1914, ch. 56, to pronounce a declaratory judgment, that power is not applicable in such a case.

So held, by the Judge before whom such an action came for trial, who considered, however, that he was precluded from giving effect to his opinion by sec. 32 of the Judicature Act, because of a prior known judgment to the opposite effect of a Judge of co-ordinate jurisdiction; and who, therefore, referred the case to a Divisional Court of the Appellate Division.

**ACTION** by Ruth M. Peppiatt, an infant, by her mother and next friend, Elizabeth Wright, plaintiff, against Cecil E. Peppiatt, defendant.

The action was begun on the 21st November, 1914.

The statement of claim was as follows:—

1. The infant plaintiff resides at the city of Hamilton, in the county of Wentworth, with her mother and next friend in this action. The defendant is domiciled in the city of Hamilton, but is temporarily resident in the State of New York.

2. The plaintiff was born on the 24th day of November, 1895.

3. On or about the 16th day of January, 1913, the infant plaintiff went through a form of marriage with the defendant, at the city of Hamilton, being at that time under the age of 18 years, without the consent required by the Marriage Act, R.S.O. 1914, ch. 148, sec. 15.

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4. After the said ceremony the defendant left the infant plaintiff, going to the United States of America, and since the ceremony the parties hereto have not cohabited and lived together as man and wife.

5. The plaintiff therefore prays: (1) for a declaration of this Honourable Court adjudging that a valid marriage was not effected or entered into between the parties hereto, and annulling the said marriage; (2) for such other relief as to this Honourable Court may seem meet.

The defendant did not appear nor defend, and the plaintiff had the pleadings noted as closed against him on the 1st February, 1915.

The plaintiff set the action down for trial at the Wentworth spring assizes, 1915.

April 9. The action came on for trial before MEREDITH, C.J. C.P., without a jury, at Hamilton.

The learned Chief Justice raised the question of the jurisdiction of the Court to entertain the action.

G. S. Kerr, K.C., for the plaintiff, urged that the trial should proceed subject to any such objection; and agreed in the view that the case should be referred to a Divisional Court of the Appellate Division.

No one appeared for the defendant.

Edward Bayly, K.C., for the Attorney-General for Ontario, referred to the following authorities: *Lawless v. Chamberlain* (1889), 18 O.R. 296; *Proud v. Spence* (1913), 4 O.W.N. 998; *A. v. B.* (1911), 23 O.L.R. 261; *May v. May* (1910), 22 O.L.R. 559; *T—— v. B——* (1907), 15 O.L.R. 224; *Malot v. Malot* (1913), 4 O.W.N. 1405, 1577; *Hallman v. Hallman* (1914), 5 O.W.N. 976; *Menzies v. Farnon* (1909), 18 O.L.R. 174; *Reid v. Aull* (1914), 32 O.L.R. 68; *Holmsted's Marriage Law of Canada*; *In re Marriage Laws* (1912), 46 S.C.R. 132, [1912] A.C. 880.

No notice of trial had been served upon the Attorney-General for Canada; and the question of jurisdiction was reserved until, among other things, if he so desired, he might be heard upon that question.

Subsequently the Attorney-General for Canada waived his right to any such hearing, as the case was to be referred to a Divisional Court, on condition that notice should be regularly given to him of any hearing in that Court; and thereupon the following opinion was expressed, and an order of reference accordingly made, under sec. 32 of the Judicature Act, R.S.O. 1914, ch. 56.

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May 19. MEREDITH, C.J.C.P.:—This is another of those cases which, though of infrequent occurrence in this Province, invariably, indeed necessarily, direct attention to the uncertain and unsatisfactory state of the marriage and divorce laws of Canada whenever they do occur: uncertain and unsatisfactory not only in the conflicting and indecisive character of the case-law upon the subjects, but equally so of the statute-law; and so it has been for many years, notwithstanding the fact that it is a thing regarding which it is of the utmost importance, not only to the persons directly concerned, but to the public as well, that there should be certainty and certainty of a satisfactory character. This case affords ample proof of all this, though other cases may afford much more. How can it be but unsatisfactory for man and woman to be uncertain whether they are really husband and wife; whether they were lawfully married to one another; as well as whether any of the ordinary Courts of law have any power to settle the question?

The conflict of judicial opinion in the Courts of this Province has been over the question whether its Courts have any power to decree that sort of divorce which follows a finding that the marriage was not a valid one; or to pronounce a declaratory decree as to the validity or invalidity of the marriage. The cases are very much opposed to one another, or, rather, the expressions of judicial opinion in them are; and they are the less helpful as none of them was ever carried to a court of appeal.

The conflict in the Province of British Columbia seems to have been mainly over the question whether the Courts of that Province had jurisdiction in divorce cases generally: a question which the Judicial Committee of the Privy Council ultimately had no difficulty in answering in the affirmative: *Watts v. Watts*.

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[1908] A.C. 573; under laws in force in the Province before it became a part of the Dominion of Canada, and unaltered by the Parliament of Canada since.

The contests in the Province of Quebec have been of a wider character; and really were whether the subject of marriage is, or may be, under ecclesiastic control: see *Hébert v. Cloutre* (1912), Q.R. 41 S.C. 249; and *Ussher v. Ussher*, [1912] 2 I.R. 445.

The recent attempt, to make plain and certain much of that which is so uncertain and unsatisfactory ended unfortunately only in a repetition of that which the Act says: that the subject of solemnisation of marriage, in the Province, is a subject within the exclusive legislative power of the Province.

Regarding legislation:—

Under the British North America Act, 1867, "marriage and divorce" are put within the exclusive legislative powers of the "Parliament of Canada" (sec. 91 (26)), with the exception of "the solemnisation of marriage in the Province," which is placed under the exclusive power of the Legislatures of the Provinces (sec. 92 (12)).

In the 48 years that have gone by since that Act was passed, there has been considerable provincial legislation upon the subject; but in the Dominion Parliament, with its very much wider powers, not a line, beyond in effect permitting a man to marry his deceased wife's sister or a daughter of his deceased wife's sister.

The result of all this is that uncertainty and that unsatisfactory state of affairs, upon a subject of such general and vital importance as marriage and divorce, to which I have referred: a state of affairs which gives rise to the main question involved in this case, the question whether the Legislature of this Province exceeded its power in enacting sec. 36 of the Marriage Act, R.S.O. 1914, ch. 148.\*

\*36.—(1) Where a form of marriage has been or is gone through between persons either of whom is under the age of 18 years without the consent required by section 15. in the case of a license, or where, without a similar consent in fact, such form of marriage has been or is gone through between such persons after a proclamation of their intention to intermarry, the Supreme Court, notwithstanding that a license or certi-

To an ordinary reader of the constitutional enactment, it might be very difficult to perceive how it was possible that there could be so much contention, and so much litigation, over the meaning of the plain words committing to the Parliament of Canada the subject of marriage generally and the subject of divorce generally and exclusively, and to each Province the subject of solemnisation of marriage, within the Province, only.

To make a contention, as has been done, the effect of which is to place, substantially, the whole subject of marriage under provincial legislative power, is, as it seems to me, to make a contention without any kind of foundation other than the desire that it might be so; the whole subject goes to Parliament with the one exception, "Solemnisation" out of it; the exception alone goes to the Provinces, exercisable by each, but only so as to affect marriages within its territorial limits.

Nor can I perceive any ground for contention, in this case, over the meaning of the words "Solemnisation of Marriage;" for, if they be given the extremest width of meaning, as wide as the meaning which some of the Courts in the United States of America have given them, and perhaps could hardly help giving them in order to give effect to the legislation in which they were used, or if they be given the meaning which I have no doubt they were intended to convey, that is, the religious ceremony which in those days in Canada was essential to a valid marriage, they cannot come near giving any kind of warrant to the Legislature of this Province to enact the legislation now in question. Solemnisation covers the ceremonial form by which marriage may be effected; it cannot affect the capacity of the man or woman to marry. Nor can it afford any justification for

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ficate was granted or that such proclamation was made and that the ceremony was performed by a person authorised by law to solemnise marriage, shall have jurisdiction and power in an action brought by either party, who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into:

Provided that such persons have not, after the ceremony, cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of 19 years.

(2) Nothing in this section shall affect the excepted cases mentioned in section 16 or apply where, after the ceremony, there has occurred that which, if a valid marriage had taken place, would have been a consummation thereof.



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the creation of a Court to consider any question of such capacity, nor indeed, in my opinion, to consider any question of the validity of the marriage with a view to any judgment directly respecting it, and the less a judgment *in rem* such as that sought in this action. That such things come within the exclusive legislative power of the Parliament of Canada, under the words "Marriage and Divorce," I cannot doubt. Those words were intended to embrace the whole of both subjects in their widest sense. Complete power to legislate upon these subjects was intended to be conferred; all, with the exception of solemnisation of marriage, being given to Parliament; and so that legislative body must have power over the capacity of the contracting parties, as well as over the whole subject of divorce, in the widest meaning of that word. Whenever the interposition of any court is needed to sever any kind of a marriage tie, that court must be a divorce court, by whatsoever name it may be called; and divorce in its entirety is within the exclusive legislative power of the Parliament of Canada. Pages of argument aimed really at having the exception not only made the rule but virtually to swallow up the rule, leaving to Parliament not even a crumb of the wedding cake, tend only to defeat their object.

That the fullest power—as full as that of the Imperial Parliament—to legislate in respect of marriage and divorce has been conferred, no one will deny; and that the wide power is in the Parliament of Canada, and quite a comparatively narrow power over the subject is in the Provincial Legislatures, is obvious; they have power over the ceremonial part of marriage only; and that power restricted to marriage effected within the territorial limits of the Province only; so that, if one do not like the ceremonial of any particular Province, he or she may choose that of another, and be married as lawfully in the one Province as the other: see *Swift v. Attorney-General for Ireland*, [1912] A.C. 276; and also *Ussher v. Ussher*, [1912] 2 I.R. 445. So, too, the Parliament of Canada might render by legislation any solemnisation unnecessary, or abolish marriage altogether, or indeed make it a crime. No such power can vest in the Pro-

vinces: their power is to provide for solemnisation only: and, as I have said, the fullest power must vest somewhere.

For very many years before as well as after the passing of the British North America Act, 1867, there never was any suggestion—that I am aware of—that any Provincial Court in Ontario had any kind of divorce jurisdiction—except that to which I shall presently refer—nor any kind of power to make any kind of judgment *in rem* as to the validity of any marriage; and the purpose and effect of the constitutional legislation in question was to commit to Parliament the whole subject of divorce, and so, as far as this Province was concerned, with quite a clean sheet, and as in nearly half a century Parliament has written substantially nothing upon that sheet, but one conclusion is possible, namely, that there is but one Court, for this Province, in which the parties to a marriage can be relieved from any marriage tie that binds them, and that is the High Court of Parliament in form—a committee of the Senate, perhaps, in reality.

The exception I have mentioned is the divorce *à mensâ et thoro*. Under the name of alimony, this Court has power to adjudicate that which is tantamount to a divorce from bed and board, by reason of pre-confederation law, with which the Parliament of Canada has so far not seen fit to interfere, but of course will when it establishes a divorce court.

In the only case in which, as far as I know, it has ever been held that the Courts of this Province have power to avoid or nullify a marriage, the learned Judge who decided it also expressed the opinion that, if there were not that power, yet there was power, under post-confederation provincial legislation, to make a declaratory judgment of the same character.\* In several later cases that has been denied, on the ground that the provincial legislation permitting this Court to “make binding declarations of right, whether any consequential relief is or could be claimed or not,” was not intended to, and does not, extend the jurisdiction of the Court to any subject not before within such jurisdiction.

It is quite obvious that that legislation cannot affect such a

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\*See *Laicless v. Chamberlain*, 18 O.R. 206.

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case as this; it is not to be considered that the Legislature intended to enact something beyond its power; and, if there were such an intention, it would be fruitless. There being no power to avoid or annul a marriage, there can be no power to declare it avoidable or annulable.

It is quite obvious, too, that such legislation would authorise a declaration, founded upon a finding, incidentally but not directly, that the parties to the marriage were or were not man and wife; for instance, on the subject of dower or even an inchoate right of dower, or alimony, or of the woman's right to pledge the man's credit, as his wife; but no finding that the man and woman were not husband and wife could be rightly based upon a voidable marriage, valid until avoided by a court of competent jurisdiction, unless such a court had avoided it: see *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] W.N. 131, [1915] 2 K.B. 536.

My conclusions, therefore, are that the provincial legislation in question is *ultra vires*; and that, therefore, this Court has not power under it, nor has it power otherwise, to consider the matters in question in this action; and that, though it has the declaratory powers I have mentioned, they are quite inapplicable to the plaintiff's claim. I accordingly abstain from making any finding upon any of the facts involved—a thing which would be unwarranted in one having no power to determine them because of want of jurisdiction.

And I am precluded from giving effect to my opinion on the question of the jurisdiction of this Court by sec. 32 of the Judicature Act, which renders a Judge of this Court incompetent to disregard a prior known judgment of any other Judge of co-ordinate jurisdiction, on any question of law or practice, without his concurrence, and provides that a Judge who deems such previous decision wrong, and the case of sufficient importance, may refer the case before him to a Divisional Court—that is, the ultimate provincial court of appeal in Ontario.

My opinion, upon each point that I have dealt with, is, necessarily, in conflict with a prior known judgment of a Judge of co-ordinate jurisdiction, there being decisions of such Judges

both ways upon all points; and emphatically the case is of sufficient importance to go further; indeed, the questions involved ought to have gone to a court of appeal long ago.

This case is accordingly referred to a Divisional Court.

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*Alien Enemy—Naturalisation—R.S.C. 1906, ch. 77, sec. 19.*

An alien enemy is not within the provisions of the Naturalisation Act, R.S.C. 1906, ch. 77.

Applications under that Act for the naturalisation in Canada of thirteen aliens were refused by the Judge presiding at an assizes, the applicants appearing to be Turkish subjects, and so alien enemies, and nothing to the contrary being shewn; and this upon the Judge's own initiative, no opposition being filed and no objection offered: sec. 19 of the Act.

*The King v. Lynch*, [1903] 1 K.B. 444, and *Porter v. Freudenberg*, [1915] 1 K.B. 857, followed.

*In re Herzfeld* (1914), Q.R. 46 S.C. 281, not followed.

APPLICATIONS by Pishak Cimonian and twelve others, aliens, for naturalisation in Canada, under the provisions of the Naturalisation Act, R.S.C. 1906, ch. 77.

February 16 and 17. The applications were heard by MEREDITH, C.J.C.P., at the Waterloo Spring Assizes, Berlin.

*M. A. Secord*, K.C., for the applicants.

No one opposed the applications.

May 19. MEREDITH, C.J.C.P.:—Among the naturalisation papers, presented at the recent Waterloo Spring Assizes, were the thirteen now being dealt with. Upon perusing them, I found that twelve of the applicants were described as formerly of Armenia, and one of them as formerly of Macedonia; and, as no more information was given as to the sovereign or state to whom or which they now owe allegiance, it seemed very probable that they were all Turkish subjects, and so alien enemies.

Being of, and expressing, the opinion that an alien enemy was not within the provisions of the Naturalisation Act, R.S.C. 1906, ch. 77, I retained the papers, in each of these matters, and

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gave leave to each applicant to give such evidence as he could, and should see fit to, give upon the question whether he is or is not an alien enemy; and to Mr. Secord, who appeared on behalf of all the applicants, I gave liberty to present any such argument, oral or written, as he might see fit to present, in support of the contention that an alien enemy is entitled to "naturalisation in Canada" under the enactment in question.

No further evidence has been given, nor has any further argument been presented, but I am very much indebted to the Department of the Secretary of State for Canada, and especially to the Under Secretary, for an expression of the views of the Department upon the subject, and for very much light thrown upon it generally.

Naturalisation in these cases is sought under the provisions of the enactment I have mentioned, and rightly so, if the affidavits of the applicants are true; for, although that enactment has been repealed by the Naturalisation Act, 1914, 4 & 5 Geo. V. ch. 44 (D.), it has, by sec. 34, been kept alive for three years in regard to aliens resident in Canada on the 1st day of January, 1915, who comply with the requirements of the earlier enactment; and that these applicants, according to their affidavits, all were, and all have done, and so are entitled to naturalisation if they are not alien enemies, or, if alien enemies, are entitled to its benefits.

In all respects, in each case, the formalities of the enactment in question have been observed, except in the insufficiency of the statements of former residence—which would not be material now if the Act be applicable to foe and friend alike; "no opposition has been filed to the naturalisation" of any of them, and "no objection thereto" was "offered during the sittings;" and so, in time of peace, the certificate of each applicant would have been directed to be filed of record in the Court, and certificates of naturalisation in Canada would thereupon have issued in due course; but I cannot think that the Act is applicable alike to subjects of countries at enmity and in amity with the British Empire, and so withhold the direction which would entitle the applicants to naturalisation certificates.

As my right to consider such a question has been raised, it may be well to read, from the enactment itself, the provisions respecting the "presentation of the certificate" and to consider that question first:—

"19. Except in the Provinces of Saskatchewan and Alberta, presentation of such certificates shall be made in open court and on the first day of some general sittings of the court, and thereupon the judge shall cause the particulars of all such certificates to be openly announced in court, the name, residence, and occupation or addition of each applicant for naturalisation being stated.

"2. Where no opposition has been filed to the naturalisation of an applicant, and no objection thereto is offered during the sittings, the court on the last day of the sittings shall direct that the certificate of the applicant be filed of record in the court.

"3. If such opposition has been filed or objection offered the court shall hear and determine the same in a summary way, and shall make such direction or order in the premises as the justice of the case requires."

It is obvious from these words, and from the purpose and whole scope of the enactment, that it is the duty of the judge to satisfy himself in regard to these things: that the papers comply with the requirements of the Act and that the case is one within its provisions, and also that the proper notice has been given and posted: and all that having been done, and if there be no opposition or objection to the naturalisation of the applicant, it is the judge's duty to give the directions provided for in the section; if there be opposition, or objection, then he must deal with the whole case judicially and "make such direction or order in the premises as the justice of the case requires."

The contention that the judge cannot concern himself with the question, whether the applicant is or is not within the provisions of the Act, is too plainly erroneous to require refutation. No judge has a right to act in any matter until assured of his authority. If the Act exclude an alien enemy, what excuse would there be for giving him the benefit of it, knowing him to be an alien enemy, or without proper inquiry into the question?

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A slovenly method of letting the certificate of naturalisation go for what it might be worth, might be dangerous, and in any case would be inexcusable.

It is quite true that the judge is not concerned with the merits of any case which is within the Act, and in which there is no opposition or objection; but that could not excuse him for any neglect of his other duties, especially the duty to take care that every one he passes on to naturalisation—to the status of a British subject in Canada—is one to whom the Act, authorising such naturalisation, is applicable.

If an alien enemy be not entitled to naturalisation under the Act in question, then it is plainly the duty of these applicants—Armenian and Macedonian—to shew that they are not alien enemies, to shew that they are not excluded from the benefits of the enactment.

In dealing with naturalisation matters, an alien enemy is the subject of a nation which is at war with the nation in which naturalisation is sought; and that too is the general meaning of the words; and an alien friend in any part of the British Empire is a subject of a nation in amity with that empire.

It is true that sometimes, for some purposes, an alien enemy is treated as if, and called, an alien friend, and even a British subject is treated as and sometimes called an alien enemy: see *Porter v. Freudenberg*, [1915] 1 K.B. 857; but that is really not correct, though quite convenient in the cases in which it occurs, actions to recover money or property, in which the test is not whether the plaintiff is an enemy or friend or alien or subject, but is, to what use the money or property may be put if the Court should aid in its recovery; to a British subject living in the country which is at war with the British Empire, no aid will be given, the enemy might be benefited; to an alien enemy living in the Empire with the license of the King to trade there, or with any proclamation or other authorisation tantamount to it, aid will be given, because the money or property recovered cannot be available to the enemy, but may be to the Empire. It is obvious that a British subject by merely living in an enemy country—sometimes he cannot get out—does not become an alien

enemy; if he should, he would be a traitor and liable to be hanged.

If a Turkish subject, each of these applicants is, and must be treated as, an alien enemy, in the consideration of his case.

Then is the earlier enactment applicable to an alien enemy?

Before considering the provisions of the enactment alone, with a view to answering that question, it is important to have in mind some indisputable facts bearing upon the subject: first, the fact that the concurrence of the "three Estates of the Realm" is necessary for the lawful admission of an alien into British allegiance; that nothing short of an Act of Parliament can authorise the naturalisation in Great Britain, or in Canada, of any person. The power of the King to grant letters of denizenship, or liberty to trade, is, it need hardly be said, a thing of a character quite different from and one which falls far short of power to grant naturalisation: second, that war revolutionises the relationship existing between nations in peace, as well as the rights and privileges of an alien turned by war from an alien friend into an alien enemy. It has been said, by an eminent Judge, that an alien enemy is not *civiliter mortuus*, that he is under disabilities, and disabilities which may be largely removed by the King's license; and that is so, but still he remains an alien enemy: and third, that naturalisation is a thing which no nation, in its own interests, should confer upon an alien enemy except with the utmost circumspection and caution, whilst very different considerations might apply to the case of an alien friend.

Then coming to the provisions of the Act in question: its main features, bearing on the question under consideration, are, first, the ease with which naturalisation in Canada can be accomplished; second, the provisions of sec. 24, under which the person naturalised is not to be deemed a British subject when "within the limits" of the State of his former allegiance, unless he has ceased to be a subject of that State under its laws or under a treaty or convention to that effect; and, third, the provisions of sec. 12, permitting naturalisation of a British subject, in a foreign State, under which he is to be deemed, in Canada,

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to have "ceased to be a British subject and shall be regarded as an alien."

Having regard to all these things, is it not inconceivable that the provisions of this enactment were intended to be applicable to nations at war with the British Empire? Inconceivable that its provisions could have been meant to apply to alien friend and alien foe entirely alike?

If it be so applicable, then, notwithstanding all the criminal laws of great stringency against treason and traitors, it expressly permits treason of the most flagrant character—it invites and enables traitors to array themselves against the British Empire—all they need to do is to go over to the enemy's country.

And, if so applicable, it turns a naturalised British subject into an enemy whenever his foot is upon the land of his former allegiance unless expatriated under its laws or conventions. So that, when he may be compulsorily fighting in a Canadian army under the provisions of the Militia Act of Canada, in and against the land of his former allegiance, the Act in question converts him into a subject of that land.

And, if intended to be so applicable, is it within the range of possibility that Parliament would have neglected to provide some stricter mode of dealing with an application of an alien enemy, and so, sometimes doubtless, with a spy, than the easy and easily misused method—easy and easily misused even if applicable to alien friends only—by which naturalisation may be obtained under this enactment.

Naturalisation in Canada has been, during the more than half a century under which it has been under my observation, really little, if anything, more than a matter of form. It could hardly be more than that having regard to the easy method by which it was attainable under the Act in question: affidavits of the applicant's residence and allegiance; a certificate of a Commissioner for taking affidavits, a Justice of the Peace or Notary, or any other of the numerous persons authorised by the Act to give it, without any power in the Court to interfere unless some one opposed or objected in the manner before mentioned—a thing which in all my experience never happened. So that, if the Act be applicable to an alien enemy, it is something

like an invitation to spies to provide themselves with the cloak of concealment which its provisions supply, giving to them aid in Canada, and, that which is worse, credentials which, in other parts of the Empire, are likely to be accepted, and relied upon with confidence.

Apart from judicial authority upon the subject, I should have no difficulty in considering the Act in question inapplicable to an alien enemy, and the cases upon the subject seem to me to support, abundantly, that conclusion.

The case of *The King v. Lynch*, [1903] 1 K.B. 444, is a somewhat recent case expressly in point under the 12th section of the Act. The ruling was that the provisions of a similar section in the Imperial enactment are not applicable in time of war, and so Lynch was found guilty of treason for doing that which the section expressly permits, but which, upon a proper interpretation of the Act, permits in time of peace only.

And, if that section of the Act be applicable in time of peace only, how can the other provisions of the Act, to which I have especially referred, be applicable in time of war? If it be treason for a British subject to become naturalised in an enemy country, can it reasonably be said that it is not equally treason for a subject of a State at war with the British Empire to become naturalised in Canada during the war?

That eminent writer upon the subject of Nationality, and upon other kindred subjects, Chief Justice Piggott, seems to have no doubt that the effect of the decision in the case of *The King v. Lynch* is that an alien enemy could not be naturalised in Great Britain, under the laws in force in Great Britain when that case was decided, laws precisely like those in question upon these applications: see Piggott on Nationality, p. 137.

In the Province of Alberta, Harvey, C.J., with, I understand, the concurrence of all the other Judges of the Supreme Court of that Province, approving of the opinion expressed in Piggott on Nationality, made a general ruling against the naturalisation of any alien enemy, a ruling in all things in point in these cases.

The statute-law of the United States of America has always, I believe, contained some expressed provision against the

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naturalisation of an alien enemy; yet the cases in the Courts of that country are not without some bearing upon the question here involved, even though the enactment in question contains no such expressed provision.

In *Ex p. Newman* (1813), 2 Gall. (U.S.) 11, which was a case of an application for permission to file the preparatory declaration for naturalisation two years before the final proceeding could be had, it was said, in refusing it: "The petitioner is an alien enemy, and therefore has no legal standing in Court to acquire even inchoate rights."

In *Ex p. Overington* (1812), 5 Binn. (Penn.) 371, an opposite conclusion was reached on the same point; but it seems to me to be plain that the opinion expressed, by Mr. Justice Story, in the case of *Newman*, is the preferable one.

And in the case of *Ex p. Little* (1812), 2 Bro. (Penn.) 218, the whole subject was fully and well dealt with. The application in that case was under a provision of the naturalisation laws to which the expressed provision against naturalisation of an alien enemy was not applicable, yet a majority of the Court found no difficulty in applying such a rule to that case as a fundamental principle of the law respecting expatriation and naturalisation. The learned Chief Judge stating in clear and forceful language the main reasons for that paramount underlying principle, namely, the impropriety of conferring citizenship, or the status of a subject, upon one who could not be claimed as a citizen or subject if he fell into the enemy's hands; the impropriety of any nation being a party to an act which might be treated as treason in the other party to that act, and which, if done by a subject of such nation, would be treason according to the laws of that nation; and the danger of admitting to the bosom of the nation an alien enemy in the stress and embitterment of actual warfare; the danger of the nation taking a viper to its breast.

Opposed to these direct rulings, and weighty indirect considerations, I am aware of one judicial opinion only, a ruling upon the very point, by Archambault, J., in a Circuit Court of the Province of Quebec: *In re Herzfeld* (1914). Q.R. 46 S.C. 281. In the month of October last, that learned Judge con-

sidered, to use his own language, that "the quality of German or Austrian aliens, in the present state of affairs, is not an obstacle to their naturalisation in Canada," under the enactment now in question. And his conclusions were based upon these three grounds, namely: (1) article 23 (b) of the Hague Convention of 1907; (2) that his functions, acting under sec. 19 of the Act in question, were merely "administrative," and so incapacity of an alien enemy to take suit did not apply; and (3) that, when commissioners or other duly authorised persons have administered the oaths of residence and allegiance and given their certificates, a Judge, acting as before mentioned, had no power to refuse to do his part in the naturalisation proceedings.

So that it is quite plain that the learned Judge did not consider in any manner the first and paramount question, whether the Act in question is at all applicable to an alien enemy; that he assumed that it was applicable to friend and foe alike, and acted in the cases before him accordingly; therefore, if his judgment stood alone, notwithstanding the great importance of uniformity of decision throughout Canada upon the subject, indeed the great importance of uniformity of laws and practice throughout the Empire upon the subject, I would not be justified in merely following his ruling. And, apart from that question, I am bound to disregard it, even if I agreed with him in the result, because the other authorities to which I have referred, one of them the Court of Criminal Appeals in England, require that my conclusion should be the opposite of that reached by him. So, too, as I have shewn, my conclusion, quite apart from the authorities, on the question whether the Act is applicable to an alien enemy or not, must have been the opposite of his; must have been that no alien enemy can be naturalised in Canada under the provisions of the Act in question; and I feel bound to add that I am also unable to agree with him in any of the three grounds upon which his judgment is based.

As to the first of them, an unusually full Court of Appeal in England has held that the clause of the Hague Convention relied upon by the learned Judge is inapplicable to England; and, if so, must be inapplicable to Canada; and so the learned Judge's view of it is directly overruled: see *Porter v. Freuden-*

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berg, [1915] 1 K.B. 857; and, if it were not so, I would find it difficult to understand how the clause could be applicable to a question of naturalisation.

In regard to the second, what difference can the character of the naturalisation proceedings make? If the law disable an alien enemy from becoming naturalised, can it be that any Judge is bound, in the face of that disability, to enable him to become naturalised? It is not the Judge who is under disability, it is the alien enemy. The disabilities of aliens are not confined to those imposed in proceedings in the Courts; there is, for instance, the disability, even in an alien friend, to hold public office; and in whatsoever they may occur they must be given effect.

And as to the last point, can there be any doubt that the Judge's duties are judicial, not merely ministerial? If any proof of their judicial character were needed, the learned and comprehensive judicial opinion expressed by the learned Judge would afford it; he has not acted as if his duties were purely ministerial. The fact that the Judge cannot *ex mero motu* enter into the merits of an application, that there must be "opposition" and "objection," something in the nature of an appeal against the certificate of the magistrate, notary or other officer, who deals with the case in the first instance, does not make the duties which the Judge has to perform any the less judicial; that is indeed generally so in regard to all appellate tribunals—there can be no judicial inquiry into any matters which have not been duly appealed against.

The subject must not be treated as if it were, and were merely, the question whether an alien enemy would be disabled from seeking redress in the civil courts, redress of the character there commonly awarded. The question is a very different one. It is whether the Act in question enables an alien enemy to become naturalised in Canada: the onus of shewing that it does rests upon him; and, if he satisfy that onus, common law disabilities cannot stand in his way: but, if he do not, nothing else can help him; and I may add, parenthetically, that if a convention, between nations, for mutual naturalisation, were confirmed by Act of Parliament, it could hardly be construed as applicable in time of war between the contracting nations. The

King's license, or a proclamation tantamount to it, may relieve from the disability to sue; but, as I have said, nothing short of an Act of Parliament can confer any right to naturalisation. Therefore, I am, with much respect, bound to differ entirely from Archambault, J., in the opinion expressed by him; and, agreeing with the contrary opinions I have mentioned, to consider that the Act in question is not applicable to an alien enemy.

If the Act could be said to be only ambiguous in that respect, driving one to a consideration of the purposes for which, and the circumstances under which, it was passed, the conclusion would be the same.

Grave reasons at once suggest themselves to the mind why such an enactment should not be applicable to an alien enemy, especially in these days when the power of some great armies is so mightily increased by the ramifications of vast numbers of spies throughout the length and breadth, and in all the corners, of the enemy country; an army of spies constituting largely the eyes, ears, and intelligence of the fighting army. With present battlefields so far away from Canada, the vital importance of every kind of protection against such a system of spying may not be fully appreciated by all of us as it should be; but, if we remember that some day the battlefields may be at or within our gates, that importance cannot but be more apparent. So, too, as I have already intimated, fairness in one part of the Empire to all other parts, demands, at least, great care in admitting any alien enemy to the status of a British subject. If the methods provided in the Act in question be applicable to such an alien, then, indeed, the least, if any, care has been taken.

On the contrary, nothing of a grave character has been, or can be, suggested. If the application for naturalisation be made in good faith, what harm can come in letting it remain in abeyance during the war? It is said that under the Dominion Lands Act no alien can obtain title to land acquired under its provisions. But assuredly, if that be a matter of consequence, the proper remedy lies in providing for discriminate grants to aliens, rather than in the indiscriminate naturalisation of alien enemies

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in order that a few persons may be able to complete their titles to lands to be granted by the Crown to them.

So that, whatever road may be taken, at the journey's end is a door closed against alien enemies; a closed door with the words "enemies excluded" written plainly above it.

There are yet, however, a few more things to be said in order that it may plainly appear that I have not overlooked anything that has been suggested, or that I can imagine, in favour of these applications.

It is said, and it is no doubt a fact, that the Secretary of State for Great Britain and Ireland has, in the present year, granted certificates of naturalisation to a number of persons who are described as Austrians, Germans, and Turks, under the present naturalisation laws of that United Kingdom, of which the Canadian Naturalisation Act of 1914 is an echo. But that fact helps these applicants little, if at all, because it may be that such persons, when so naturalised, had been, in accordance with the laws of the land of their natal allegiance, expatriated or otherwise relieved from such allegiance. It is not to be presumed that any Minister of the Crown would be a party to an act, and would make the United Kingdom a party to an act, which would be, in the other party to it, an act of treason for which he or she rightly might be hanged or shot; and of course the fact—if it be a fact—that the Secretary of State is of opinion that he has power to grant naturalisation to an alien enemy, would not confer the power; whether he has or not can be determined only by the proper Courts, including the High Court of Parliament; and, besides all that, the enactment under which such naturalisation took place is so widely different from the Act in question in these applications, that a binding decision in favour of the power under the former, could, in no sense, be considered a decision in favour of the right of an alien enemy to naturalisation under the latter.

A Canadian order in council and proclamation, of the 28th October, 1914, makes it plain that, at that time, the Governor-General in council deemed that an alien enemy might be naturalised in Canada. The last paragraph of the proclamation

makes it plain. But, again, all that has little, if any, effect upon the question under consideration, for the like reasons as those expressed as to the action of the Imperial Secretary of State. To the Courts, not to the Governor-General in Council, belongs the interpretation of the law; an assumption that an alien enemy is entitled to be naturalised in Canada may, or may not, be right in regard to the naturalisation enactment of 1914. I hold that it cannot be right only in regard to the earlier enactment. Whether the Governor in Council has, or has not, power to curtail the right to naturalisation in Canada, by virtue of the War Measures Act, it is quite plain that there is no such power to extend it.

If the subject be considered of sufficient importance to be taken before a court of appeal, either to the Supreme Court of Canada under the provisions of sec. 60 of the Act governing that Court, or to the Appellate Division of the Supreme Court of Ontario, I shall do everything in my power to facilitate any such appeal; and, for that purpose, Mr. Secord's contention, at the assizes, may be treated as also a refused application to me, as a Judge of the Supreme Court of Ontario, for a mandamus to compel me, as *persona designata* under the 19th section of the Act in question, to make the direction provided for in that section so that the naturalisation of these applicants may be carried on to completion, with leave, for what it may be worth, to appeal in any possible way, though I fear that none of these things can aid very much, if at all, in getting the matter before any Court of this Province.

If no such steps, or any other for the same purpose, be taken within thirty days, no direction, such as the 19th section of the Act provides for, will be made, and so the applicants must fail in their present efforts to become naturalised in Canada; but, if any such steps be taken, the applications will be held in abeyance, for a reasonable length of time, to obtain the opinion of some court of appeal upon the subject, which, if favourable to the applicants, can then be given effect to by me.

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## BURROWS v. GRAND TRUNK R.W. CO.

*Railway—Public Footway under Tracks in City—Dangerous Condition—Injury to Pedestrian—Negligence of Railway Company and City Corporation—Liability of City Corporation—Addition as Party after three Months from Time of Injury—Action Barred by Municipal Act, R.S.O. 1914, ch. 192, sec. 460 (2)—Liability of Railway Company—Railway Act, R.S.C. 1906, ch. 37, sec. 241—Expert Witnesses—Evidence Act, R.S.O. 1914, ch. 76, sec. 10—Damages—Costs.*

It was held, upon the evidence, that a subway, affording passage to foot-passengers under railway tracks in a city, was out of repair and in a dangerous condition by reason of the negligence both of the railway company and the city corporation, the defendants, and that injuries sustained by the plaintiff, while lawfully using the subway, were the result of that negligence.

The action having been brought against the railway company only, and the city corporation having been added as a party at a later stage, more than three months after the date of the plaintiff's injury, it was held, that the claim against the city corporation was barred by sec. 460, subsec. 2, of the Municipal Act, R.S.O. 1914, ch. 192, although the action was begun within the three months.

The railway company was held liable under sec. 241 of the Railway Act, R.S.C. 1906, ch. 37.

It was also held, that the plaintiff had not transgressed by calling more than three expert witnesses (sec. 10 of the Evidence Act, R.S.O. 1914, ch. 76), for, although five medical men were witnesses for the plaintiff, three only were regarded as expert witnesses.

The plaintiff's damages were assessed at \$3,500.

Judgment was given for the plaintiff against the railway company with costs, including the costs incurred by the addition of the city corporation as a party, for it was reasonable and proper to add the corporation.

*Till v. Town of Oakville* (1915), 33 O.L.R. 120, and *Besterman v. British Motor Car Co.*, [1914] 3 K.B. 181, followed.

The action as against the city corporation was dismissed without costs.

ACTION against the Grand Trunk Railway Company of Canada and the Corporation of the City of Guelph to recover damages for injuries sustained by the plaintiff, while passing under the tracks of the defendant railway company, through a covered foot subway, in the city. The plaintiff was struck by a piece of concrete which fell from the ceiling above the way, and was injured. He alleged that the subway was in a dangerous condition, and charged negligence on the part of the defendants or one of them.

May 11 and 12. The action was tried by CLUTE, J., without a jury, at Guelph.

*G. H. Watson, K.C., and W. E. Buckingham, for the plaintiff.*

*D. L. McCarthy, K.C., and W. E. Foster, for the defendant railway company.*

*I. F. Hellmuth, K.C., and P. Kerwin, for the defendant city corporation.*

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May 27. CLUTE, J.:—Action for damages for injuries received by the plaintiff from falling concrete while passing under the public foot subway under the tracks of the Grand Trunk Railway Company, in the city of Guelph.

The subway for vehicles was made under the authority of an order of the Dominion Railway Board, amended by a subsequent order of the Board, whereby authority was given to construct a footway east of the carriageway upon land sold by the Grand Trunk Railway Company to the city for that purpose; the same to be constructed by the railway company at the expense of the city.

On the 10th November, 1914, while the plaintiff was passing along Huskison street, in the city of Guelph, and when in the foot subway underneath the tracks of the defendant railway company, a portion of what is called the cement plaster fell from the ceiling upon the head of the plaintiff, inflicting serious injury. He was found in an unconscious condition, with portions of the plaster upon him, was removed to his home, and was confined to his house from the effect of the injuries for some time; he has not fully recovered.

The subway was, without doubt, in a dangerous condition at the time of the accident, and had been in such dangerous condition for a long time. Both the Grand Trunk Railway Company and the city were aware of its dangerous condition, the company having been expressly notified of the fact by the city.

The subway was under the supervision of the inspector of bridges and buildings for the company. William Caley was the inspector. He says he had no experience prior to his appointment. He lives in Stratford. He heard a few complaints of the condition of the subway in 1912 and 1913, and he directed a plasterer to make the repairs—a Mr. Mahoney. Mahoney made partial repairs, but stated that it was better not to proceed

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further until spring because of the fear of frost. The repairs were not made by Mahoney personally; he sent his men to do the work, with instructions to drive nails into the cement in order to hold the plaster. He was not present himself. He says: "We looked for holes in the cement; I ordered nails to be driven into the cement, a quantity of nails; I noticed several places where the iron girders were—we found places where it was loose by the girders. The yard square was replaced; I reported that repairs should be done. I would have done it, but it was late, too close to frost. I did not make a thorough job; Mr. Caley, the superintendent, spoke to me about it; I advised him not to have it done till spring; the water was the cause of it coming off. Mr. Caley said he would have it done in the spring. I saw the water come through; I saw the winter was coming on, and I left it as it was. This was in October, 1912. The material produced in Court was the material my men put on. It was not safe to do any more because the water came through."

Caley, the inspector, says that the last witness, Mahoney, may have reported to him that it was better not to do more until spring, owing to the frost conditions. He further states that in 1913 it was not completed; that he did not require it to be done. He says there was seepage; that he knew there were pieces falling down from time to time. "I have not the least idea what made it come down. A jar would break it; I always knew it might occur; I saw the condition it was in. I saw that a train passing might bring it down."

A number of other witnesses prove beyond a doubt that it was in a dangerous condition for over a year prior to the accident, and that both defendants knew it and did not take adequate means to make it reasonably safe and fit for use as a subway used by the public.

The writ in this action was issued on the 17th December, 1914. The accident occurred on the 10th November, 1914. The City of Guelph was added as a party on the 4th March, 1915—more than three months after the accident occurred.

I think the claim as against the City of Guelph is barred by sec. 460, sub-sec. 2, of the Municipal Act, R.S.O. 1914, ch. 192. This section provides that "no action shall be brought against a

corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained." Although the writ was issued within the time, the city was not brought in as a party until the expiration of the period within which action might be brought against it. Otherwise I should have held that the city was, equally with the Grand Trunk Railway Company, guilty of negligence which caused the injuries complained of.

I find that the original structure was defective in its construction, and was in a "crumbling" condition, and was defective and dangerous, for want of repair, and that the repairs which were made were not properly made, and the subway was not made safe. The production of the portions that had fallen shewed that no proper bond had been made between the cement plaster and the concrete; and, as one witness expressed it, "It could not be good," that is, as I understand it, it could not be made safe in that way. The nails were driven in first, and the cement placed around them.

The railway company is, in my opinion, liable under the Railway Act, R.S.C. 1906, ch. 37, sec. 241 of which provides that "every structure, by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under or through such structure."

As to the question of damages, the evidence was very contradictory. There were six experts called, three on each side, whose evidence was diametrically opposed to each other, the question being as to whether or not the injuries complained of caused the condition from which the plaintiff is now suffering. A few days prior to the accident, the plaintiff had been examined for insurance, and found to be in a healthy condition. The examining physician was called, and he stated that he found no symptoms of hardening of the arteries, and that the plaintiff was in good health. Other evidence shews that he continued to manage his business down to the time of the accident; that he has not been able to manage his business since; and that the probability is, taking the most favourable view, that he will not be able to

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attend to his business for at least from two to three years. He drew from his business about \$1,400 a year for himself. There was evidence called to shew that a man with his expert knowledge could command from \$1,500 to \$2,500 a year. I do not accept as reasonable the large claim for damages made by the plaintiff; but, after a careful consideration of all the circumstances, I find that \$3,500 would be a reasonable sum to allow, and I assess the damages at that sum.

Objection was taken by Mr. McCarthy that more than three experts were called by the plaintiff without making a request for leave prior to their being called.\* I did not regard nor did I act upon the evidence of any of the witnesses called by the plaintiff as expert evidence, except the three doctors, namely, Dr. Alfred Thomas Hobbs, Dr. MacAllan, and Dr. Barnes. Two other doctors were called by the plaintiff: the one, Dr. Torton, was the attending physician, who simply described the condition in which the plaintiff was after the accident, and Dr. Savage, who made the examination for insurance.

The plaintiff is entitled to judgment against the Grand Trunk Railway Company for \$3,500, with costs; and, inasmuch as the company in its correspondence with the plaintiff's solicitor took the ground that the City of Guelph was liable, I find that it was reasonable and proper that the plaintiff should add the city as a party, and that the plaintiff is entitled to include the costs incident to the City of Guelph being added a party as part of the plaintiff's costs in the cause—under the authority of *Till v. Town of Oakville* (1915), 33 O.L.R. 120, and *Besterman v. British Motor Cab Co.*, [1914] 3 K.B. 181. As I entertain no doubt that the City of Guelph was negligent in regard to seeing that the repairs were properly done upon the subway, it is not entitled to costs, and the action as against the City of Guelph is dismissed without costs.

\*Section 10 of the Evidence Act, R.S.O. 1914, ch. 76, provides: "Where it is intended by any party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the Judge or other person presiding, to be applied for before the examination of any of such witnesses."

## [APPELLATE DIVISION.]

1915

June 1.

## ORR V. ROBERTSON.

*Mechanics' Liens—"Owner"—Contract — "Request" to Build—Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, sec. 2 (c)—Personal Liability—Evidence.*

The defendant T., having a lease of land, sublet it to the defendant H., the latter agreeing to build upon the land according to plans to be approved by T.; and H. entered into a contract with the plaintiff to build accordingly:—

*Held*, that the taking from H. of an agreement to build was a "request" from T., within the meaning of sec. 2 (c) of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140; and that the interest of T. as "owner" was subject to the lien of the plaintiff under the Act.

*Held*, also, that, although H. was not personally liable to the plaintiff under the contract between them, he had, upon the evidence, made himself liable for certain work done by the plaintiff by personally giving an order for such work.

APPEALS by the defendants Tyrrell and Hyland from the judgment of Mr. R. S. Neville, K.C., an Official Referee, in a proceeding to enforce a mechanic's lien.

May 19. The appeals were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

*Shirley Denison*, K.C., and *A. W. Holmsted*, for the appellant Tyrrell, argued that he never made a "request" to have the work done such as would render him liable as "owner" under the provisions of sec. 2 of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140: *Gearing v. Robinson* (1900), 27 A.R. 364; *Slattery v. Lillis* (1905), 10 O.L.R. 697. The statute was not to be construed so as to impose liability on the owner beyond what the owner asked to have done for him. Besides, the contract being under seal, suit could only be brought against a party so bound: *Halsbury's Laws of England*, vol. 7, p. 333; *Southampton (Lord) v. Brown* (1827), 6 B. & C. 718.

*Gideon Grant*, for the appellant Hyland, contended that, while the plaintiff might have a lien against his client's interest in the land, there should be no personal judgment against Hyland. He was no party to the contract between Orr and Robertson, and the evidence was not sufficient to render him liable personally for anything.

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*G. L. Smith*, for the plaintiff, respondent, said that it was not desired to hold Hyland liable for anything under the contract made between Orr and Robertson; but there was evidence to shew that Hyland ordered the front of the building to be pulled down. This was a separate contract, and Hyland had been rightly found personally liable therefor. As to Tyrrell, he was personally liable also, because he signed the plan and took out the building permit. As to the liability of Tyrrell's interest in the land, Tyrrell's approving of the plan and his other activities in the matter were sufficient to constitute a "request" under sec. 2 of the statute, so as to render him liable as "owner."

June 1. The judgment of the Court was delivered by RIDDELL, J.:—This is an appeal from the decision of R. S. Neville, K.C., in a mechanic's lien proceeding—the defendants Tyrrell and Hyland appealing.

Upon the hearing of the appeal we decided against the contention of Tyrrell in respect of his personal liability, but reserved the question as to the lien upon his interest in the land in respect of the sum for which he was not directly and personally liable.

In 1913, the Rowland estate leased the land to Tyrrell for a term of years; in the same year, Tyrrell sublet to Hyland, with an agreement that Hyland should build according to plans to be approved by Tyrrell. Hyland entered into a contract with the plaintiff (executed unfortunately under seal by Hyland's agent in his own name) to build accordingly. Even if Tyrrell took no further or other part in the matter, we think this is a "request" under R.S.O. 1914, ch. 140, sec. 2(c).<sup>\*</sup> While, to render the interest of an owner liable, the building etc. must have been at

<sup>\*</sup>(c) "Owner" shall extend to any person . . . having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and

- (i) upon whose credit or
- (ii) on whose behalf or
- (iii) with whose privity and consent or
- (iv) for whose direct benefit

work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

his request, express or implied, there is no need that this request be made or expressed to the contractor—if the owner request another to build etc., and that other proceeds to build, by himself or by an independent contractor or in whatever manner, the building being in pursuance of the request, the statute is satisfied. The taking of a contract from Hyland to build is a request within the meaning of the statute.

This appeal must be dismissed with costs.

The personal liability of Hyland is alone in question.

The learned Referee has given effect to the rule in *In re International Contract Co., Pickering's Claim* (1871), L.R. 6 Ch. 525, and has declined to fix Hyland with personal liability under the contract, and this is not complained of.

From an examination of the evidence I am of opinion that, so far as personal liability has been made to attach to Hyland, there is sufficient evidence to justify the Referee in deciding, as he has done, that Hyland gave the order personally for such work.

Hyland's appeal should also be dismissed with costs.

*Appeals dismissed with costs.*

[APPELLATE DIVISION.]

BALFOUR V. BELL TELEPHONE CO. OF CANADA.

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June 1.

*Master and Servant—Liability of Master for Negligence of Servant — Driver of Hired Vehicle—Servant of Owner or Hirer—Evidence.*

The defendants hired a horse and waggon from a liveryman, who also supplied a driver. This driver was to some extent under the control of the defendants' foreman, who sat beside him while he was driving, and directed him where and when to stop and go on; the driver also assisted in the work the defendants were doing for which they used the horse and waggon, and in that was under the orders of the foreman; but the driver was the servant of the liveryman and was paid by him; and, as the liveryman testified, the defendants or their foreman had nothing to do with the actual driving of the horse. The plaintiff suffered damage by reason of the reckless driving of the horse by this driver during the period of hiring by the defendants:—

Held, that the defendants were not liable.

*Consolidated Plate Glass Co. of Canada v. Caston* (1899), 29 S.C.R. 624, followed.

Judgment of the County Court of the County of Wentworth reversed.

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APPEAL by the defendants from the judgment of the Senior Judge of the County Court of the County of Wentworth, in favour of the plaintiff, in an action for damages for injury done to the plaintiff's motor car by a horse and waggon owned by one Temple, a liveryman, hired by the defendants, and driven by a man named Spera, a servant of Temple. Temple was brought in by the defendants as a third party.

The trial Judge found that the horse was being recklessly driven by Spera at the time the waggon ran into the plaintiff's car, and this was not disputed by the defendants; they appealed from the finding that they were responsible for the recklessness or negligence of Spera.

May 17. The appeal was heard by RIDDELL, LATCHFORD, KELLY, and LENNOX, JJ.

H. A. Burbidge, for the appellants, argued that the case was on all fours with *Consolidated Plate Glass Co. of Canada v. Caston* (1899), 29 S.C.R. 624, and so the defendants should not be held liable. The defendants' foreman had no right to direct the driver how he should drive the horse, nor could he have taken over the driving of the horse himself. And so it could not be said that the driver was so under the control of the defendants as to render them liable for his negligence: *Fleuty v. Orr* (1906), 13 O.L.R. 59; *Saunders v. City of Toronto* (1899), 26 A.R. 265; *Standard Oil Co. v. Anderson* (1909), 212 U.S. 215; *Driscoll v. Towle* (1902), 181 Mass. 416; *Jones v. Scullard*, [1898] 2 Q.B. 565; *Donovan v. Laing Wharton and Down Construction Syndicate Limited*, [1893] 1 Q.B. 629.

C. W. Bell, for the plaintiff, respondent, distinguished the *Consolidated Plate Glass Co.* case upon the facts, and referred to the report of the same case in the Court of Appeal, *sub nom. Caston v. Consolidated Plate Glass Co.* (1899), 26 A.R. 63, at p. 66.

The third party was not represented.

June 1. LATCHFORD, J.:—The defendants appeal on the ground that, as between the plaintiff and the defendants, the judgment of His Honour Judge Snider is not warranted by the evidence.

The third party was not represented in the appeal.

The finding that the horse which caused the accident to the plaintiff was driven recklessly is not disputed. But the appellants contend that there is no evidence to warrant the conclusion that the driver was so under their control as to make them responsible in law for his negligence.

The finding on the point is as follows: "The man Spera, who was driving at the time of the accident, was sent with the horse, and employed with the horse and rig to work for the telephone company. The man was hired by Temple, and Temple, the liveryman, owned the rig, and he sent Spera with the rig each morning to be under the supervision and command of the Bell Telephone Company's foreman. While there, it was his duty to do just what the foreman might tell him to do as to driving the horse, to go where he told him to drive, to load on what he happened to be wanting to put in, and to stop when he said to stop, *and it would have been his duty to stop driving furiously if the foreman had seen fit to tell him to do so when he sat beside him, before this injury occurred.* It is also clear from the evidence that his duty was not limited to driving the horse. When the horse was standing idle, while work was being done along the street in stringing wires or carrying wires into a house, it was the duty of this man Spera to make himself useful at the company's work in such way as the foreman might direct him to do. He helped to string the wires, to hold the ladders, helped to load and helped to unload, just as the foreman might order him to do, all through the day, and when the horse was standing at any point on the street, and it was necessary to move him up to another point, if this man Spera happened to be engaged on other work under the foreman, other members of the gang, the telephone company's servants, moved the horse up as it might be required; so that it seems, as far as could be so, after he arrived at seven o'clock in the morning at the spot where they were to go to work, he became to a large extent the general servant of the company, under the direction and control absolutely of the telephone company's foreman, as much so as any man they had employed; and it was while so working, and with the foreman sitting beside him, to whose command he was bound to conform,

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as is admitted by all, that he did this reckless driving, taking the gang and their ladders and so on back to the telephone company's yard. He undoubtedly would have been bound to stop anywhere the foreman had told him to do, because it is said by all that he was under the orders and control of the foreman from the time he reached their work in the morning until he left them again. . . . The driver was not master of his own movements at all. He was not left to act upon his own judgment. During the working hours he had not control over the movements of the horse and waggon, nor even over his own movements; and certainly Temple, the liveryman, was not in control of him. The foreman of the defendant company not only exercised the power of control over the driver and horse, but he had the right to exercise this power of control; the driver was to be in his hands, to the knowledge of both the defendant company and of Temple, for that very purpose; and, at the time when the injury was done to the plaintiff's automobile, the defendant company's foreman sat beside the driver on the seat, and said nothing to stop the recklessness that I am quite certain was taking place. It was well understood by both the defendant company and the third party that the defendant company's foreman should have entire control of Spera while working for him; from the time he arrived on the job each morning and began the day's work under this foreman, Spera became, I think, a servant of the defendant company."

There is evidence that, under the arrangement made between Temple and the defendants, by which he furnished them with the horse, waggon, and driver at \$3 per day, Spera, like other drivers so furnished, was to obey the orders of the defendants' foreman, and make himself, as well as his horse and waggon, useful to the defendants.

Temple's evidence on the crucial point of the control exercised by the defendants over Spera's management of the horse he was driving at the time of the accident, is clear and uncontradicted. He was asked (p. 84):—

"Q. His (Spera's) wages were not to be paid by the telephone company—you paid his wages? A. I paid his wages.

"Q. The telephone company had nothing to say as to how he

should manage his horses, or feed them or drive them or harness them, or anything of that kind? A. *No, I don't know as they had.*

"Q. He was a competent driver and knew all about the care of horses? A. *I never had considered my horses subject to their control.*

"Q. When you say 'subject to their control,' the only control was to tell him where he was to drive to? A. Yes, and what he was to do.

"Q. When he was not driving? A. When he was not driving, he was working for them.

"Q. Tell him where he was to go?

"His Honour: Q. Where he was to take them? A. Yes.

"Q. And what he was to do for them when he was not driving? A. Yes.

"Q. But as to the conduct or management of the horse, the actual driving of the horse, the telephone company had nothing to do with? A. *No, they had nothing to do with the actual driving of the horses.*"

I may add that the defendants had no control over the hiring of Spera, and could not dismiss him.

Spera was to stop the horse when and where he was told to stop it by the defendants' foremen, and one of such foremen was seated beside him at the time of the accident. From these facts the learned Judge infers—against the positive evidence of Temple—that the defendants could have controlled the driving of the horse, and, not having controlled it, that they are therefore liable for Spera's negligence.

In *Jones v. Scullard*, [1898] 2 Q.B. 565, in which the leading decisions on the point involved here are reviewed by Lord Russell, C.J., it is stated (p. 574) that "the principle . . . to be extracted from the cases is that, if the hirer simply applies to the livery-stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver."

In one of the cases cited by Lord Russell, *Donovan v. Laing Wharton and Down Construction Syndicate Limited*, [1893] 1

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Q.B. 629, Bowen, L.J., said (p. 634): "If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven."

In *Consolidated Plate Glass Co. of Canada v. Caston*, 29 S.C.R. 624, Sir Henry Strong, C.J., said, in delivering the judgment of the Court (p. 627): "A fair and reasonable test to apply is this: Could the hirer have himself taken absolute control of the vehicle, horse and harness, taking it altogether out of the possession of the driver?"

In a recent case in the Supreme Court of the United States—*Standard Oil Co. v. Anderson*, 212 U.S. 215, Moody, J., in delivering the judgment of the Court says (p. 222), referring to cases where horses and a driver are furnished by a liveryman: "In such cases the hirer, though he suggests the course of the journey and in a certain sense directs it, still does not become the master of the driver and responsible for his negligence, unless he specifically directs or brings about the negligent act."

A case very like the present case is *Driscoll v. Towle*, 181 Mass. 416, in which the defendant furnished a horse, waggon, and driver to the Boston Electric Light Company, and was held liable for the driver's negligence while the driver was carrying out orders received from the company.

Had Spera caused the accident while making himself useful to the defendant in stringing wires, holding ladders, or loading or unloading the waggon—while he was their servant and subject to their control—the defendants would, I think, be liable for his negligence. But, in driving the horse as he was driving it at the time of the accident, he was the servant, not of the defendants, but of Temple.

I therefore think the appeal should be allowed with costs, and the action dismissed with costs, exclusive of the costs of bringing in the third party.

RIDDELL, J.:—I agree.

KELLY, J.:—The conditions under which Temple's horse, waggon, and driver were engaged and used by the defendants were such as to bring this case within the authority of *Consoli-*

*dated Plate Glass Co. of Canada v. Caston*, 29 S.C.R. 624, where the principle on which that Court decided that liability is to be determined was laid down.

The evidence is sufficiently clear that, beyond the right to tell the driver what to do and where to drive during the working hours, the defendants had no right to direct how he should manage the horse or drive it, and had no such power or control over the driver as gave them the right to discharge him. Temple himself says that he never considered his horses subject to the defendants' control.

I am of opinion that the appeal should be allowed, and the action dismissed, with costs, except such as have been occasioned by bringing in the third party.

LENNOX, J., concurred.

*Appeal allowed.*

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[APPELLATE DIVISION.]

DAVIS ACETYLENE GAS CO. v. MORRISON.

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June 2.

*Practice—County Courts—Writ of Summons—Special Endorsement—Affidavit of Merits Filed with Appearance—Election of Plaintiff to Treat as Record—Day Set for Trial—Order of Junior Judge Allowing Delivery of Statement of Defence—Delivery of Counterclaim as well—Order of Senior Judge Setting aside—Determination that Pleadings Unnecessary—Appeal—Final Order—County Courts Act, sec. 40 (2).*

In an action in a County Court, commenced by a specially endorsed writ of summons, the defendant appeared and filed a sufficient affidavit of merits under Rule 56. The plaintiffs elected, under Rule 56 (2), to treat the endorsed claim and the affidavit as the record, applied to the Senior Judge of the County Court to set a day for trial, obtained from him an appointment for a certain day, and served notice of trial for that day, under Rule 56 (2). Three days later, and before the day set for trial, the defendant applied *ex parte* to the Junior Judge, and obtained an order authorising the delivery of a statement of defence, under Rule 56 (5). The defendant then delivered a statement of defence and counterclaim; and the Senior Judge, on the application of the plaintiffs, made an order setting aside the order of the Junior Judge and the pleading delivered by the defendant:—

*Held*, on appeal, that the order of the Senior Judge was not supportable on the ground that the defendant's application was made to the Junior instead of the Senior Judge, nor on the ground that the Senior Judge was seized of the case, having made an order for its trial before himself:

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the order of the Junior Judge was not irregular or improper unless because it was made *ex parte*.

But, as Rule 56 (5) authorises the granting of leave to deliver a statement of defence only when it sets up a further or other answer to the plaintiff's claim than that contained in the affidavit, the order of the Senior Judge was right; for, upon the record as it stood before the delivery of the statement of defence, the defendant might prove all that he alleged in the statement of defence.

*Held*, also (HODGINS, J.A., *dubitante*), that "statement of defence" in Rule 56 (5) does not include a counterclaim; and the counterclaim was properly set aside.

*Held*, also, that the order of the Senior Judge was final in its nature, and the appeal lay: County Courts Act, R.S.O. 1914, ch. 59, sec. 40 (2).

*Smith v. Traders Bank* (1905), 11 O.L.R. 24, and *M. Brennen & Sons Manufacturing Co. Limited v. Thompson* (1915), 33 O.L.R. 465, followed.

*Per* HODGINS, J.A.:—The order of the Junior Judge, having been made *ex parte*, could not be supported and was properly set aside.

*Joss v. Fairgrieve* (1914), 32 O.L.R. 117, followed.

Order of the Senior Judge of the County Court of the County of Lambton affirmed.

APPEAL by the defendant from an order of the Senior Judge of the County Court of the County of Lambton setting aside a statement of defence and counterclaim delivered by the defendant in an action in that Court, in the circumstances set out below.

May 31. The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., and RIDDELL and LATCHFORD, JJ.

*D. Inglis Grant*, for the appellant.

*Featherston Aylesworth*, for the plaintiffs, respondents, raised the objection that the order was not a final one, within the meaning of sec. 40 (2) of the County Courts Act, R.S.O. 1914, ch. 59, and also opposed the appeal on the merits.

The points raised and the Rules and cases cited are set out in the judgments.

June 2. RIDDELL, J.:—On the 10th March, 1915, the plaintiffs issued a specially endorsed writ from the County Court of the County of Lambton; on the 22nd March, the defendant entered an appearance with a sufficient affidavit of merits under Rule 56.\* The

\*56.—(1) Where the writ is specially endorsed the defendant shall with his appearance file an affidavit that he has a good defence upon the merits and shewing the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action and shall forthwith serve a copy of such affidavit upon the plaintiff. The affidavit may be made by the defendant or by any one having knowledge of the facts.

(2) If the plaintiff so elects he may then treat the claim endorsed upon the writ, and the affidavit, as constituting the record, and may within

plaintiffs elected, under Rule 56(2), to treat the endorsed claim and the affidavit as the record, applied on the 27th March to the Senior Judge for a day for trial, and obtained the 21st April for that purpose—they then served notice of trial under Rule 56(2).

The defendant, on the 30th March, applied *ex parte* to the Junior Judge, and obtained an order allowing him to file a statement of defence: Rule 56(5); he filed a statement of defence and counterclaim, which the Senior Judge set aside on the 12th May. The defendant now appeals.

The reasons given by the learned County Court Judge are as follows:—

“Prior to the 21st April, on account of the illness of the defendant, it was necessary to postpone the trial, as he was unable to attend; and, on this application coming before me, it was mentioned that His Honour Judge Taylor had granted an order, dated the 30th March, under the Rule, allowing the defendant to file a statement of defence. On interviewing Judge Taylor, I found out that, although I attend to all County Court matters, unless out of town or ill, an application had been made to him, although I was in town and in my Chambers on that day, without informing him that on the 27th March I had given an appointment to try the case on the 21st April, and that notice of trial had been filed and served for that day: he was neither informed of my presence in town, nor that the record had been closed under the Rule.

“Further, on a perusal of the affidavit filed with the appearance, I was of opinion that the affidavit would permit the defendant to bring up at the trial all that the statement of defence contained.

“For these reasons I set aside the order made by His Honour Judge Taylor, and refused leave to file a statement of defence.

five days serve notice of trial. In such case the defendant shall be entitled to 21 days' notice of trial.

(3) Either party may then have discovery and shall make production as in ordinary cases.

(4) If the defendant fails to file an affidavit the appearance shall not be received and the plaintiff shall be entitled to sign judgment for default of appearance.

(5) A defendant may obtain leave to deliver a statement of defence setting up any further or other answer to the plaintiff's claim.

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The Junior Judge should have been informed that I was in town, and also that, under clause 2 of Rule 56, the record was closed five days after the appearance and affidavit were filed, which took place on the 27th March, and that on the latter day I had set a date for the trial."

I do not think that the learned Judge intended to make it a ground for his order that application was made to the Junior Judge rather than to himself—the powers and duties of the two Judges are, in all matters material here, identical, and neither can abdicate his powers or abrogate his duties. It is, no doubt, sometimes very convenient that their duties should be divided: but that convenience should be the convenience of the public, not of the Judges—and no such division of duties can interfere with the rights of litigants. Judges are the servants not the masters of the people. Neither is it any ground that the Senior Judge was seized of the case and had made an order for its trial—no doubt, the Junior Judge, had he been made aware of that fact (as he should have been), would have referred the matter to the Senior Judge; the omission to do so, however, does not render the order irregular or improper.

The application for the order to serve a statement of defence was *ex parte*, and not, as it should have been, on notice: but I do not proceed on the ground that this may make the order improper.

It may be that Rule 56 contemplates that the defendant shall set out in his affidavit all the facts and circumstances constituting his defence—I think it does—but if, by mistake, inadvertence, or even intention, an omission be made, I do not think that the defendant is precluded in every case from setting up the omitted facts as a defence. An application made under Rule 56(5) will be treated by the Judge who hears it in much the same way, as to costs and otherwise, as any other application to amend the record.

The real question to my mind is as to the relevance of the statement of defence and its effect if allowed—for, if the record as it stood before the statement of defence would allow all the facts to be proved, as the learned Judge thinks, there is no need of the statement of defence, and it was properly set aside. Rule 56(5)

allows a statement of defence only which sets up a "*further or other answer to the plaintiff's claim.*"

The claim is for the balance due upon a written order for a Davis generator etc.; the affidavit of the defendant sets out: (1) "a good defence on the merits;" (2) the goods were defective and not as represented, nor were they installed in proper working order as agreed by the plaintiffs; (3) if a written order was signed, the defendant's signature was obtained "through misrepresentation as to the quality of the machinery and the results to be obtained therefrom."

This is in effect saying: (a) I do not admit signing any order; (b) if I did, my signature was obtained by misrepresentation both as to the quality of the goods and the results to be obtained therefrom; (c) the goods were not as represented, but were defective; (d) and were not installed in proper working condition.

The statements (c) and (d) may mean that it was a condition precedent to liability that the goods should be as represented and must be installed in proper working condition—the plaintiffs, electing, as they did, to take the affidavit as the defence, must be considered as electing to meet these allegations or to submit to their having every possible effect, whether by way of condition or warranty, justified by the facts as proved. Looking now at the statement of defence; para. (1) is general; (2) sets up, as a condition precedent to liability, installation in proper working condition and capacity to light the defendant's residence—this is covered by (c) and (d) above. Para. (3) simply alleges failure in the condition mentioned in para. (2). Para. (4) sets up as a condition precedent that the plant would operate for 30 days with one filling with carbide, whereas it would work only 6 days on one filling. This may fairly be considered as coming under (c). Para. 5 sets out as a condition precedent that the lighting by the goods supplied should be not more expensive than by coal oil lamps—this also comes under (c). Para. 6 sets up as a condition precedent that the plant supplied would "properly, efficiently, and economically light the defendant's residence—this also comes under (c). But this paragraph adds "that the installation of this plant would not affect the defend-

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ant's insurance upon the building" as a representation—it is not said that this was a condition precedent to liability—but I presume it was intended so to be pleaded, and not by way of damages for breach of warranty or the like, since the "counterclaim" does not mention it. By a little stretch of the language, this may come under (c). In view of the intimation by the County Court Judge that he was of opinion that, without any amendment or statement of defence, the defendant might prove at the trial all he alleges in the statement of defence, I think the defendant might well have been satisfied—no appellate tribunal would think of reversing the trial Judge in such a matter. This contest is all over a petty matter of pleading, with an expression of opinion by the trial Judge in favour of the appellant.

There is a more important matter—the defendant sets up a counterclaim. Rule 56(5) does not give power in so many words to grant leave to file a counterclaim: and, in view of the language of Rule 112, I do not think that "statement of defence" in Rule 56(5) includes a counterclaim. The case of a defendant to a specially endorsed writ desiring to counterclaim, when the plaintiff elects under Rule 56(2), seems to be a *casus omissus*: and I think no power is given in such a case to allow a counterclaim to be pleaded. All that can be set up is a "further or other answer to the plaintiff's claim," which a counterclaim is not. Whether a defendant can in his affidavit under Rule 56(1) set up a counterclaim, I do not consider. What is intended to be decided is that Rule 56(5) does not authorise a counterclaim. (I may add that here the order of the Junior Judge does not speak of a counterclaim.) The difficulty, however, is only technical—if the defendant had a real counterclaim (speaking generally) the Court would not permit execution to go for the full amount of the claim until the counterclaim could be tried.

A question was raised as to the right of appeal: but *Smith v. Traders Bank* (1905), 11 O.L.R. 24, approved by this Court in *M. Brennen & Sons Manufacturing Co. Limited v. Thompson* (1915), 33 O.L.R. 465, is conclusive that an appeal will lie.

On the merits I think the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., concurred.

HODGINS, J.A.:—I concur in the dismissal of the appeal, on the ground that the order of the Junior Judge, having been made *ex parte*, could not be supported and therefore was properly set aside: *Joss v. Fairgrieve* (1914), 32 O.L.R. 117.

In view of the expressions of opinion by the Senior Judge and by the majority of this Court as to the ground covered by the affidavit of the defendant, the leave obtained turns out to have been unnecessary.

If the defendant's right to set up a counterclaim as a defence to the action were necessarily involved in this appeal, I should doubt whether he is debarred by the language of Rule 56 from obtaining leave to plead it. But it is not necessary to decide this, as he did not obtain leave to counterclaim.

*Appeal dismissed with costs.*

[APPELLATE DIVISION.]

MORRISBURGH AND OTTAWA ELECTRIC R.W. CO. v. O'CONNOR.

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June 7.

*Company—Subscription for Shares—Non-delivery of Prospectus—Ontario Act respecting Prospectuses Issued by Companies, 6 Edw. VII. ch. 27, sec. 3 (3)—Effect of—Contract Voidable not Void—Election to Affirm—Delay in Repudiating—Action for Calls—Implied Repeal of Statute by Companies Act, 1907.*

The rule in regard to voidable (not void) subscriptions for company-shares is, that the right to avoid must, if exercised at all, be exercised promptly on discovering the facts.

That rule, derived from *Oakes v. Turquand* (1867), L.R. 2 H.L. 325, and other cases cited in Palmer's Company Precedents, 11th ed., pp. 196, 197, though these are cases of subscriptions obtained by misrepresentation, is applicable to subscriptions not so obtained, so long as they are merely voidable and not void; and the statutory provision (Ontario statute 6 Edw. VII. ch. 27, sec. 3 (3)) that no subscription for stock, obtained by verbal representations, shall be binding upon the subscriber, unless he shall, prior to subscribing, have received a copy of the prospectus, has no greater effect than to make the subscriber's contract voidable if the prospectus has not been received—he may elect to approve or disaffirm.

And *held* (HODGINS, J.A., dissenting), that the defendant, who in 1911 subscribed for shares and paid 10 per cent. of the face value, but failed to pay subsequent calls, and did nothing to repudiate his subscription, although he knew that the company considered him a shareholder and that his name was on the list of shareholders, had elected to affirm his contract, and could not, in an action for calls brought nearly three years after the date of his subscription, succeed upon the defence that he had not received a prospectus.

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*Quare*, whether the Act above referred to, an Act respecting Prospectuses issued by Companies, 6 Edw. VII. ch. 27, was repealed by the Ontario Companies Act, 1907, 7 Edw. VII. ch. 34.

*Per* HODGINS, J.A.:—The effect of sec. 3 (3) of 6 Edw. VII. ch. 27 was to wipe out the subscription or make it legally non-existent; and no act appeared to have been done by the defendant from which his assent to becoming a shareholder could be inferred; where the contract to take shares is void, liability depends upon assent in fact to the name being on the register.

*In re Railway Timetables Publishing Co.* (1889), 42 Ch.D. 98, followed. Judgment of the County Court of the County of Carleton affirmed.

APPEALS by the defendants, in the above and nine other actions brought by the same plaintiffs, from the judgments of the County Court of the County of Carleton, in favour of the plaintiffs.

The actions were brought to recover the amounts of calls made upon the defendants respectively as holders of shares of the capital stock of the plaintiffs, an incorporated company.

June 1. The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., and RIDDELL and LATCHFORD, JJ.

*Montague G. Powell*, for the appellants.

*G. D. Kelley*, for the plaintiffs, respondents.

The contentions of counsel and the statutes, cases, and other authorities, relied on, are set out in the judgments.

June 7. RIDDELL, J.:—The plaintiffs, an electric railway company, brought eleven actions in the County Court of the County of Carleton for the amount of calls on the capital stock—the defences were in substance two, misrepresentation in procuring subscriptions and non-delivery before subscription of a prospectus. His Honour Judge O'Reilly, sitting for the Judge of that County Court, gave judgment in favour of the plaintiffs, and ten appeals were taken to this Court. All the appeals were argued together: the defendants' counsel admitted that he could not succeed on the ground of misrepresentation, and the cases turned on the second ground of defence.

The defendants relied on sec. 3(3) of an Act respecting Prospectuses issued by Companies, 6 Edw. VII. ch. 27 (O.): "No subscription for stock . . . induced or obtained by verbal representations, shall be binding upon the subscriber, unless prior to his so subscribing he shall have received a copy of the prospectus."

Assuming this statute to be in full force and not modified by subsequent legislation, we dismissed nine of the appeals, the defendants having, with full knowledge of the facts, ratified their positions of shareholders, by acting as directors, attending meetings of shareholders, giving proxies, paying calls on the stock, or the like unequivocal acts—we considered that the most the Act could effect would be to wipe out the subscription altogether, and that if the subscriber himself, with full knowledge of the facts, took the position of shareholder, he was a shareholder. *Quilibet renuntiare potest lege pro se introducto.*

O'Connor's case we reserved, and it is now to be decided.

O'Connor is a real estate agent: he was canvassed by McFarlane, the promoter, and in March, 1911, signed a subscription list for 10 shares in the company. The subscription was accepted in June, and notice of allotment sent to and received by the defendant—he had paid \$100, 10 per cent. of the face value of the stock, on subscription, but he failed to pay subsequent calls, though duly notified of such calls. A meeting of shareholders was held in July for the election of directors and general organisation—the defendant received notice of at least one meeting (he says in September), but he does not seem to have attended any or done any act which would establish his status as shareholder.

This action was brought in December, 1913: the defendant never took steps to repudiate his subscription, although he knew that he was being considered a shareholder by the company and that his name was on the list of shareholders.

The plaintiffs contend that the Act of 1906, 6 Edw. VII. ch. 27, had, before the transactions in question, been repealed by the Ontario Companies Act of 1907, 7 Edw. VII. ch. 34, and that sec. 210 of this Act relieves them of the necessity of delivering a prospectus. In view of the language of sec. 3 of this Act, and of the fact that the statute of 1906 is omitted in schedule E, this repeal by implication may be doubtful. But there is a sound reason why this defence should not succeed.

The defendant allowed his name to be on the list of shareholders for two years and more, without objection, and I think he cannot be relieved now.

The rule in regard to voidable not void subscriptions is, that

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the right to avoid must, if exercised at all, be exercised promptly on discovering the facts. "For his name being on the register, he is held out to the public as a member, and persons may be induced to act on the faith of his membership: *Oakes v. Turquand* (1867), L.R. 2 H.L. 325:" Palmer's Company Precedents, 11th ed., p. 197. The cases given in Palmer, pp. 196, 197, are uniform in this direction.

In *Carrique v. Catts* (1914), 32 O.L.R. 548, I thought that this principle should be extended to a proposed "syndicate"—the majority of the Court did not apply the principle in that particular case, but expressed no opinion adverse to its complete acceptance in the case of a company.

The cases are, it is true, cases of subscription obtained by misrepresentation; but they are decided on the fact that such a subscription is voidable only—that it is voidable by reason of misrepresentation is immaterial, it is the voidability of the contract which is material.

In the present case, there is no statutory prohibition against a company procuring subscriptions without the prior delivery of a prospectus so as to render such a subscription void as being in contravention of a statute—all that is done is to provide that a company procuring a subscription in that way does so at its own peril—the subscriber is not bound, but may elect to approve or disaffirm—in short, the contract is voidable and not void. It is wholly immaterial on what ground or for what reason it is voidable—the important matter is that it is so.

I think this appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., concurred.

HODGINS, J.A.:—I regret to be unable to agree with the view of the majority of the Court.

The effect of the section dealt with by my brother Riddell is, to my mind, to wipe out the subscription or make it legally non-existent.

No act appears to have been done by the appellant O'Connor from which his assent to becoming a shareholder can be inferred.

In *Challis's Case*, *Somerville's Case* (1871), L.R. 6 Ch. 266, the contributory knew that his name had been entered in the

register. Lord Hatherley, L.C., says (pp. 271, 272): "But no authority can be found for holding that a person, by simply doing nothing, may be rendered liable." The time which had elapsed in that case was about 6 months. Two other contributories were held liable because they had, after notice, retained the certificates sent, and acknowledged them.

In *Baillie's Case*, [1898] 1 Ch. 110, Wright, J., held a contributory not liable, after the lapse of a year, where there was in law no contract with the company who had put him on their register, holding his non-action no objection to his success.

I think the true principle to be applied is that stated in *In re Railway Timetables Publishing Co.* (1889), 42 Ch. D. 98, that, where the contract to take shares is void, liability depends upon assent in fact to the name being on the register.

This is, I think, recognised by the later text-writers. See Palmer's Company Law, 9th ed., pp. 114-5; Hamilton's Company Law, Parker's Can. ed. (1911), p. 137; Stiebel's Company Law, 1912 ed., p. 210.

In the last-named work it is thus stated: where the agreement is a void agreement, then the contributory to be held liable must have, with full knowledge of the facts, done acts which are only consistent with his being a shareholder in respect of the shares.

In Hamilton's Company Law, *op. cit.*, in cases where there was no authority and no antecedent agreement, the condition of non-liability is thus expressed (p. 137): "provided he does not act as the holder of such shares or in any other way expressly or by necessary implication accept such shares."

I think O'Connor's appeal should be allowed with costs.

*Appeals dismissed with costs; HODGINS,  
J.A., dissenting in O'Connor's case.*

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[APPELLATE DIVISION.]

May 13.  
May 29.  
June 14.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. V. SATURDAY NIGHT  
LIMITED.

*Libel—Newspaper—Security for Costs — Libel and Slander Act. R.S.O. 1914, ch. 71, sec. 12—Order of Master in Chambers Refusing Motion for Security—Jurisdiction of Master—Appeal from Master's Order—Reversal by Judge in Chambers—Order for Security and Dismissing Action in Default—Right of Appeal to Appellate Division—Rule 507—Leave to Appeal—Substantive Order—Sub-sec. 4 of sec. 12.*

In an action for a libel published in a newspaper, the defendant company, the publisher, applied to the Master in Chambers, under sec. 12 of the Libel and Slander Act, R.S.O. 1914, ch. 71, for an order for security for costs, upon an affidavit of the editor of the newspaper, which stated, "I am satisfied, after diligent inquiry, that the plaintiff is not possessed of property sufficient to answer the costs of the action," etc. The Master refused the application; the defendant company appealed from the Master's order to a Judge in Chambers, and at the same time applied to the Judge for a substantive order for security for costs:—

*Held*, by MIDDLETON, J., allowing the appeal and ordering the plaintiff company to give security for costs, that, although the onus is upon the defendant under the statute to establish the negative, his statement on oath that he has made inquiry and found no property is sufficient to shift the onus, and the plaintiff, who has the knowledge, cannot complain if, in the absence of evidence to displace the *prima facie* case, it is found that his insolvency has been shewn.

The order made by MIDDLETON, J., provided that, in default of the security being given within a limited time, the action should be dismissed with costs.

Upon an application by the plaintiff company, under Rule 507, for leave to appeal from the order of MIDDLETON, J., it was *held* by MEREDITH, C.J. (C.P.), that there was good reason to doubt the correctness of the order, and that any leave to appeal that a Judge in Chambers had power to give should be given; but *quære*, whether the Master in Chambers had jurisdiction to entertain a motion under sec. 12, and whether, if he had jurisdiction, an appeal lay from his order; and remarks upon the extraordinary provisions of Rule 507. *Quære*, also, whether an appeal would not lie without leave—whether an order dismissing an action with costs, unless certain security for costs is given within a limited period, is not an order finally disposing of the action: Rule 507 (1). *Quære*, also, whether, if the affidavit upon which the order was made did not comply with the requirements of the Act, as well as if there were no such affidavit, sec. 12, sub-sec. 4, would preclude an appeal: whether such an order could be said to be "an order made under this section," the section permitting the making of the application for the order upon such an affidavit only.

*Paladino v. Gustin* (1897), 17 P.R. 553, referred to.

The plaintiff company launched an appeal from the order of MIDDLETON, J., and it was *held*, by a Divisional Court of the Appellate Division, that that order was a substantive order for security for costs, and that an appeal from it did not lie: sub-sec. 4 of sec. 12.

APPEAL by the defendant company, in an action for a libel alleged to have been published in the defendant company's newspaper, from an order of the Master in Chambers dismissing the

defendant company's motion for an order for security for costs, under sec. 12\* of the Libel and Slander Act, R.S.O. 1914, ch. 71; and application by the defendant company for a substantive order for security.

May 7. The appeal and application were heard by MIDDLETON, J., in Chambers.

*G. M. Clark*, for the defendant company.

*W. J. Elliott*, for the plaintiff company.

May 13. MIDDLETON, J.:—By sec. 12 of the Libel and Slander Act, a defendant is entitled to security for costs upon a motion based upon "an affidavit . . . shewing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith. . . ."

The only question is whether the affidavit filed upon this motion complies with the requirements of the statute by shewing that the plaintiff is not possessed of sufficient property. The affidavit filed states: "I am satisfied, after diligent inquiry, that the plaintiff is not possessed," etc., etc. The Master held that

\*12.—(1) In an action for libel contained in a newspaper the defendant may, at any time after the delivery of the statement of claim, or the expiry of the time within which it should have been delivered, apply to the Court or a Judge for security for costs, upon notice and an affidavit by the defendant, or his agent, shewing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous; and the Court or Judge may make an order that the plaintiff shall give security for costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order shall be a stay of proceedings until the security is given.

(2) . . .

(3) For the purposes of this section the plaintiff or the defendant or their agents may be examined upon oath at any time after the delivery of the statement of claim.

(4) An order made under this section by a Judge of the Supreme Court shall be final and shall not be subject to appeal, but when the order is made by a Local Judge an appeal therefrom shall lie to a Judge of the Supreme Court sitting in Chambers, whose order shall be final and shall not be subject to appeal.

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this was not a compliance with the statute, and that the absence of property was not shewn.

With great respect for the learned Master, I am unable to agree with his conclusions. The plaintiff, and the plaintiff alone, can know what property he possesses. Manifestly, any one deposing to the absence of property must speak from information and belief; and, while I am most anxious to avoid giving any countenance to reckless statements in affidavits or unduly expanding the class of cases in which affidavits may be made on information and belief, I think I should err in the opposite direction if I acceded to Mr. Elliott's contention and compelled an affidavit to be made in the form suggested by the Master.

From the earliest time there has been much discussion as to the *onus probandi* where the matter to be proved was negative and the truth was peculiarly within the knowledge of the other party. The earlier cases are collected in Best on Evidence, para. 274.

In *Dickson v. Evans* (1794), 6 T.R. 57, the question was, whether a defendant to an action brought by the assignees of a bankrupt should be allowed to set off certain notes which, it was said, came to his hands before bankruptcy. If notice of the assignment could be brought home to the defendant before the notes were acquired, that would have prevented a set-off. The question was as to the onus. The Court held that it lay upon the defendant to establish the absence of notice. Ashhurst, J., said (pp. 59, 60): "It is a general rule of evidence that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant: but it is said in this case that it was incumbent on the assignees to prove the time when the defendant received these notes. But the assignees could have no means of knowing that fact, whereas it must have been known to the defendant."

In *Rex v. Turner* (1816), 5 M. & S. 206, Bayley, J., says (p. 211): "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative;" but this statement is regarded as

too wide; for in *Elkin v. Janson* (1845), 13 M. & W. 655, Alderson, B., said (p. 662): "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the *weight* of the evidence, but there should be some evidence to start it, in order to cast the onus on the other side." This, I think, must be taken to be the rule.

Although the onus is upon the defendant under the statute to establish the negative, it appears to me that he has sufficiently shewn the plaintiff's impecunious condition when he has made inquiry. As put in an American case, quoted with approval in Wigmore on Evidence, para. 1623 (*Nininger v. Knox* (1863), 8 Minn. 140, 148), "it would seem that the fact of insolvency, from its nature, must usually exclude direct proof, as no one, save the person himself, could ordinarily safely swear that a man had no property, or insufficient to meet his liabilities, at any given time." For this reason, evidence of inquiry and reputation was received.

The whole question was discussed in a case to which I cannot now find the reference, where the point in issue was the existence of property qualification to entitle a voter to retain his name upon the list. The particular qualification was shewn not to exist. If the voter owned any other property within the municipality he was nevertheless entitled to be upon the list. The evidence was that on search and inquiry the ownership of other property could not be ascertained. This, it was held, was sufficient to shift the onus. So here, where as the result of inquiry no property can be found, there is, I think, some evidence; the onus is shifted; and the plaintiff, who has the knowledge, cannot complain if it is found that his insolvency has been shewn.

This being so, the statute has been complied with, and the order should be made.

The costs of the application here should be to the defendant in any event in the cause, and the costs of the motion before the Master should be in the cause.

The plaintiff company moved under Rule 507\* for leave to

\*507.—(1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of the whole or part of the action or matter may appeal therefrom to a Divisional Court without leave.

(2) Except in cases in which a right of appeal is specially conferred no appeal shall lie from any judgment or order of a Judge in Chambers

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appeal to a Divisional Court of the Appellate Division from the order made by MIDDLETON, J., which required the plaintiff company to give security for the defendant company's costs, and directed that, in default of such security being given within a limited time, the action should be dismissed with costs.

May 21. The motion was heard by MEREDITH, C.J.C.P., in Chambers.

*W. J. Elliott*, for the plaintiff company.

*G. M. Clark*, for the defendant company.

May 29. MEREDITH, C.J.C.P.:—The plaintiff company makes this application to "a Judge in Chambers" for leave to appeal from an order of another "Judge in Chambers," directing that this action be dismissed with costs, if the plaintiff company do not comply with its terms respecting security for costs.

The application is based upon Rule 507, the provisions of which are extraordinary: made, apparently, to lessen appeals in matters of practice merely, it provides for an appeal, in substance, from every kind of order of that character, and an appeal of an objectionable character, an appeal from one Judge to another, of co-ordinate jurisdiction, though the one Judge may be a Judge of very many years' judicial experience, and the others of little or no such experience; and, in addition to that, a further appeal to a Court of five Judges, if the inexperienced Judge give leave. Why the Judge who hears the matter in the

which does not finally dispose of the whole or part of the action or matter, unless by leave of a Judge other than the Judge by whom the judgment or order was pronounced.

(3) Such leave shall not be given unless:—

(a) There are conflicting decisions by Judges upon the matter involved in the proposed appeal, and it is in the opinion of the Judge desirable that an appeal should be allowed; or

(b) There appears to the Judge to be good reason to doubt the correctness of the judgment or order from which the applicant seeks leave to appeal, and the appeal would involve matters of such importance that in the opinion of the Judge leave to appeal should be given;

(4) The application for leave shall be upon notice served within four days and returnable within seven days from the judgment or order.

(5) If leave be given, the appeal shall be forthwith set down by the applicant and shall be heard by a Divisional Court without further notice.

(6) No appeal under this Rule shall be a stay of proceedings unless so ordered by a Judge.

first place should not give, or withhold, leave to appeal, it is difficult to understand; as also why the whole matter should be gone over again before another Judge, having precisely the same powers, and all to determine only whether leave to appeal, in a matter of practice merely, should, or should not, be given. If the Judge who first considers the question is not competent to give, or withhold, leave to appeal, he is not competent to hear and determine the substantial question. And, if there must be a motion for leave to appeal to some other Judge, why not to a Judge of different jurisdiction, a Judge of the Appellate Division? And, to whatever Judge the application is made, why compel him to sit in judgment upon the judgment in the first instance, as the Rule in question in effect does; why not permit him to give, or withhold, leave without forming any opinion as to the soundness, or unsoundness, of the opinion of the Judge from whose order or ruling an appeal is sought, not to mention discussing and dealing with it as if the second co-ordinate Judge were a court of appeal?

But the Rule is now in force, and I am bound to follow it: but am at liberty to express the hope, which I am sure is shared by litigant and lawyer alike, that, when it has next to be followed, it may be to its "last resting-place."

If this matter really come within the provisions of the sub-clauses of Rule 507—and it was not suggested by any one upon the argument of this motion that it does not—I would grant leave to appeal, for these reasons:—

Because, if the case of *Paladino v. Gustin* (1897), 17 P.R. 553, were well decided, the defendant company has not brought itself within the provisions of the enactment upon which alone it relies for security for costs—the Libel and Slander Act, sec. 12—in not having, upon its application, *shewn* that it has a good defence on the merits. The case of *Paladino* arose under a different section of the enactment, but the two sections are quite alike in this respect; and all who are at all familiar with the practice of the Courts are familiar with the wide difference between swearing to a good defence upon the merits and *shewing* that there is a good defence on the merits.

Because the defendant company has not shewn that the

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plaintiff company is not possessed of property sufficient to answer the costs of the action.

And to settle any question whether the Master in Chambers has any jurisdiction under the section of the Act in question: and, if he have, whether any appeal lies to a Judge in Chambers against his order.

The Act in question is, as a Divisional Court has pointed out—*Robinson v. Morris* (1908), 15 O.L.R. 649—in derogation of common law rights, an encroachment, for the benefit of a class, upon the right to boast, as of old, that the Courts of law are open to poor and rich alike: and, though it is to be deemed remedial, those who seek its class legislation benefits, must bring themselves fairly within it, in order to obtain any of such special benefits.

One of the things which it was essential that the defendant company should have *shewn*, to entitle it to the order it has obtained, is, that the plaintiff company is “not possessed of property sufficient to answer the costs of the action;” and the only way in which any attempt to shew that was made—if indeed it can be called an attempt to do so—is contained in the statement of the defendant company’s “managing editor,” in an affidavit sworn to by him, that he is satisfied, after diligent inquiry, that the plaintiff company is not possessed of property sufficient to answer the costs of the action. That I cannot consider any kind of legal evidence.

In the enactment in question the Legislature has, undoubtedly, gone a long way in conferring special benefits upon those in the same class as the defendant company, but it has, assuredly, stopped short of making them their own judges in a libel action brought against them. It is yet for the Courts, and judicial officers, not for the defendant, to be “satisfied” that the other party to an action is not possessed of sufficient property to answer the costs of the action; and indeed to make diligent investigation upon legal evidence to enable them to reach a true conclusion upon that question.

That which might satisfy an interested litigant is hardly likely always to satisfy his judge; indeed, what might satisfy an interested litigant might be hardly of any kind of weight with

his judge: and there is nothing but the judgment of the litigant, in his own case and without disclosing even his reasons for that judgment, to support this order.

As the learned Judge eventually said, in expressing his reasons for making the order in question, nothing is gained by a discussion of any question as to the onus of proof in other cases, because the enactment in question very plainly puts the onus of proof upon the defendant; it is only when the defendant company has proved all the things required, by the section in question, to be proved, that it has any right, under it, to security for costs. And it must be remembered that this is an action for libel; and, if it be, as I understand, though the pleadings have not been placed before me, for libellous publication respecting the plaintiff company's credit or conduct as merchant or trader, that "the law guards most carefully" such things; that any imputation of insolvency, or any suggestion of pecuniary difficulties, is actionable *per se*; and that the onus of proof of every plea of justification is upon the pleader of it; so that it would be unfair to give to any defendant, who has to come into Court under any such circumstances, any reason to believe that that which has been sworn to by the defendant company's managing editor, on the application in question, is anything like admissible evidence of the plaintiff company's insolvency.

Nor is that onus a very great price to pay for the special privilege afforded. Property is not a condition of the mind; indeed it is a thing rather hard to conceal, whether in lands or goods; it is but a small quantity that can be hidden up one's sleeve: and this applies with the greatest force to an incorporated company such as the plaintiff company is, whose officers, and any other person having any knowledge materially bearing upon the subject, may be examined under oath in support of a motion such as that in question: Rule 228.

It is not difficult to ascertain from plaintiffs, whose interests lie in shewing how much, not how little, they are worth, what property, if any, they possess, whether in lands, goods, or money due for unpaid-for stock—without mentioning other assets: and, again, this is especially true of incorporated companies, with their statutory obligations. But not a word is vouchsafed by

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the defendant company of any kind of inquiry made by it, or in its behalf.

And the matter involved is one of importance, not only to the defendant company, but also to others upon whom efforts might be made to impose the restriction of this class legislation: therefore, if this case be one within the sub-clauses of Rule 507, leave to appeal may be taken, if necessary.

If the case be one within the Rule itself, no leave to appeal is needed: and there is the right to appeal without leave, necessarily, to have the question whether it is within this Rule, or within its sub-clauses, considered: see *Stewart v. Royds* (1904), 118 L.T.J. 176. The question under the Rule is: whether an order dismissing an action with costs, unless certain security for costs is given within a limited period, is an order finally disposing of the action. At first sight my inclination would be to say that it is. But that question is not now before me for consideration.

So, too, of the question whether there was any power to order that the action be dismissed unless security be given as ordered. The Act itself provides for a stay of proceedings until the security is given, and that the security shall be given in accordance with the practice in cases of security given by persons residing out of the jurisdiction; but there is no provision for, or authorisation of, a dismissal of the action. The Act giving a special and limited right, and expressly providing for its effect, and even for the manner in which security is to be given, it is difficult to see how the provisions of the Rules can add a right to dismissal of the action. To the extent, if any, that the order exceeds the power conferred by the law, there may be, of course, an appeal.

And, again, if there were no legal evidence adduced upon the motion shewing that the plaintiff company is not possessed of property sufficient to answer the costs of the action, there would, I think, be a right of appeal notwithstanding sub-sec. 4, though leave to appeal under Rule 507 might be necessary. As described by a learned Judge—*Robinson v. Mills* (1909), 19 O.L.R. 162—the requirements of the Act are “pre-requisites” upon which power to make an order rests. If no affidavit, no

power. If *no* evidence, that is, legal evidence, no power also: the case is not within the Act.

Sub-section 4 of the section in question—sec. 12 of the Libel and Slander Act—provides that an order of the Supreme Court as to any one of the “pre-requisites,” under that section, shall be final and shall not be subject to appeal. It also gives expressly a right of appeal from an order made by a Local Judge to a Judge of the Supreme Court sitting in Chambers, whose order also shall be final and not subject to appeal.

If, therefore, the application in question had been made in the first instance to the Judge in Chambers, it would not, if, and in so far as it is, authorised by the Act, be subject to appeal; but it was not so made, it was made upon an appeal against an order made by the Master in Chambers, and so is not, literally at all events, within the meaning of sub-sec. 4.

And again the wording of the Act gives rise to the questions: whether the Master in Chambers has any power to make an order under the Act; and, if so, whether there is any appeal from such an order. Having regard to the expressed right of appeal, to a Judge in Chambers, from a Local Judge, the implication may be that there is no such right of appeal from the Master in Chambers; or else that there is no power in the Master in Chambers to make any order under the Act, which would not be an unreasonable thing, seeing that a Judge in Chambers is as readily available as the Master in Chambers, and that the order of a Judge in Chambers is to be conclusive; indeed, in such circumstances, it would seem like needless circumlocution if it were made necessary to apply to the Master in Chambers first.

All things considered, it seems to me to be proper that any leave to appeal that I may have power to give should be given; and that the costs of this motion should be costs in the action to the plaintiff company in any event; and this application is disposed of accordingly.

June 14. The plaintiff company's appeal from the order of MIDDLETON, J., was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., LATCHFORD and KELLY, JJ.

W. J. Elliott, for the appellant company, argued that the defendant company had not complied with sec. 12, sub-sec. 1, of

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the Libel and Slander Act, and cited *Abrath v. North-Eastern R.W. Co.* (1883), 11 Q.B.D. 440, at p. 457; Halsbury's Laws of England, vol. 13, p. 435. The Master in Chambers had no power to make the order in question, and hence there could be no appeal from it: see Rule 208. The order of MIDDLETON, J., is not a substantive order. The affidavit as to the defence on the merits is not sufficient: *Lancaster v. Ryckman* (1893), 15 P.R. 199; *Paladino v. Gustin*, 17 P.R. 533, at p. 557.

*G. M. Clark*, for the defendant company, respondent, argued that under sub-sec. 4 of sec. 12, the order of MIDDLETON, J., was final, and the appeal should be quashed; and also supported the order as properly made in the circumstances.

At the conclusion of the argument, the judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—We are of opinion that the order of Mr. Justice Middleton is a substantive order for security for costs, and that there is no appeal from it: sub-sec. 4 of sec. 12 of the Libel and Slander Act, R.S.O. 1914, ch. 71. Our view in that respect is confirmed by the defendant company's notice of appeal from the order of the Master in Chambers, which contains a substantive application for an order that the plaintiff company give security for costs.

*Appeal dismissed.*

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June 15.

[APPELLATE DIVISION.]

YOUNG V. BANK OF NOVA SCOTIA.

*Landlord and Tenant—Tenant Overholding and Paying Rent—Presumption—Evidence—Tenancy from Year to Year—Corporation-tenant.*

Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance; but when he pays, or expressly agrees to pay, any subsequent rent at the previous rate, a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsistent with a yearly tenancy. The presumption that the new tenancy is from year to year may be met by evidence of another and different tenancy; but, if no other tenancy appear, the presumption is not met.

*Roe dem. Brune v. Prideaux* (1808), 10 East 158, and other cases, referred to.

And in this case, where the defendants, an incorporated company, tenants under a sealed lease from the plaintiff, took possession and continued in possession after the expiration of their term, and paid rent monthly at

the rent reserved by the lease, they were held to be tenants from year to year, no other tenancy being shewn.

*Held*, also, that, a valid tenancy actually existing, the consequences of overholding and paying rent are the same for a corporation-tenant as any other.

*Finlay v. Bristol and Exeter R.W. Co.* (1852), 7 Ex. 409, and *Garland Manufacturing Co. v. Northumberland Paper and Electric Co. Limited* (1899), 31 O.R. 40, considered and distinguished.

*Doe dem. Pennington v. Taniere* (1848), 12 Q.B. 998, followed.

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APPEAL by the defendants from the judgment of the District Court of Thunder Bay.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The facts, as I understand them, are few and simple. By an indenture made under seal, the plaintiff leased to the defendants, a chartered bank, certain premises in Fort William, for a term of 18 months from the 1st September, 1912, at a rental “yearly and for every year during the said term . . . of \$2,700 . . . payable . . . in even portions monthly of . . . \$225 . . . each; the first of such payments to . . . be made on the first day of October, . . . 1912.” The tenants entered into possession and remained in occupation during the term; before the termination of the lease, a number of conversations, which might perhaps be called negotiations, took place between the plaintiff and the agent of the defendants, but no arrangement was arrived at.

When the term was up on the 1st March, 1914, the defendants, having paid rent according to the lease, continued on in possession, and on the 5th March, another conversation took place, but with no definite result. The defendants paid, expressly as rent, the sum of \$225 on the following dates in 1914, March 31, April 30, June 30, July 31, August 31, September 30, October 31, and November 28. Cheques are produced for these payments, marked “rent”—the May cheque is not produced, but there is no dispute that the rent was paid in that month also. The defendants having obtained other premises, and claiming to be “a monthly tenant,” on the 20th October, 1914, served notice of delivering up possession, and went out of possession on or before the end of November. If the tenancy was “a monthly tenancy,” it is admitted that the notice is

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sufficient; but the plaintiff contends that the tenancy was from year to year.

The action was launched on the 13th January, 1915, and is for \$225, the rent claimed to be due on the 1st January, 1915; the defendants in their pleadings claim a specific agreement for a monthly tenancy, and that during this "monthly tenancy, lasting from the 28th day of February, 1914, to the 1st day of December, 1914," the heating was insufficient, etc.

At the trial before His Honour Judge O'Leary, the defendants failed to establish the alleged agreement for a monthly tenancy, and also any defence on the heating, etc. His Honour held that a tenancy from year to year was created; that, accordingly, the notice of giving up possession was insufficient; and that the plaintiff was entitled to recover.

June 1. The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., and RIDDELL and LATCHFORD, JJ.

C. A. Masten, K.C., for the appellants.

W. N. Tilley, for the plaintiff, respondent.

The arguments of counsel are sufficiently stated in the judgment.

The following authorities, as well as some of those cited in the judgment, were referred to by counsel: *Smith v. Widlake* (1877), 3 C.P.D. 10; *Winnipeg Land and Mortgage Corporation v. Witcher* (1905), 15 Man. R. 423, 426; Bell's Landlord and Tenant, p. 32; *National Malleable Castings Co. v. Smiths' Falls Malleable Castings Co.* (1907), 14 O.L.R. 22; *Hill v. Ingersoll and Port Burwell Gravel Road Co.* (1900), 32 O.R. 194; *Bain v. Anderson* (1896), 27 O.R. 369; Halsbury's Laws of England, vol. 8, p. 384; *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581, 598; *Vansickler v. McNight Construction Co.* (1914), 31 O.L.R. 531; *Dougal v. McCarthy*, [1893] 1 Q.B. 736, 739.

June 15. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—Upon the argument before us there were two main contentions which now fall to be considered.

The first can be disposed of without difficulty—it is contended that, under the facts, no implication of tenancy from year to year could arise, even if the tenant were not a corporation.

“Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance; but when he pays, or expressessly agrees to pay, any subsequent rent at the previous rate, a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsistent with a yearly tenancy:” Woodfall on Landlord & Tenant, 19th ed., p. 257; *Bishop v. Howard* (1823), 2 B. & C. 100; *Hyatt v. Griffiths* (1851), 17 Q.B. 505. But it is said, “This . . . appears to be matter of evidence rather than of law:” Woodfall, same page; *Thetford (Mayor of) v. Tyler* (1845), 8 Q.B. 95; *Idington v. Douglas* (1903), 6 O.L.R. 266; *St. George Mansions v. King* (1910), 1 O.W.N. 501, 15 O.W.R. 427 (a decision of a Divisional Court of the High Court); *Roe dem. Brune v. Prideaux* (1808), 10 East 158 (this case is wrongly cited as in “10 Exch.,” 6 O.L.R., last line of p. 266.)

This is perfectly true, but, as was said in the last cited case, at p. 187, by Lord Ellenborough: “The receipt of rent is evidence to be left to a jury that a tenancy was subsisting . . . ; and if no other tenancy appear, the presumption is that that tenancy was from year to year.” Here no other tenancy was made to appear, and the presumption is not met.

The defendant then sets up that, even if under such circumstances a private individual would be held liable as tenant from year to year, a corporation cannot be—and cannot be because it is a corporation. Every corporation must judge for itself whether it should set up such a defence, and whether it should avail itself of a technical rule of law to obtain an advantage over an individual which another individual or a firm could not. But, however such a defence may be characterised, this bank is entitled to the full benefit of any rule of law available to it: and, as the defence is insisted upon, it must be considered and given full effect to.

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The cases relied upon are *Finlay v. Bristol and Exeter R.W. Co.* (1852), 7 Ex. 409, and our own case of *Garland Manufacturing Co. v. Northumberland Paper and Electric Co. Limited* (1899), 31 O.R. 40.

In each case the company had been in possession for a year without a lease under seal, but under an agreement by parol, and held over afterwards for a time, paying rent at the former rate. This was considered not to make them tenants from year to year, and they were held liable for use and occupation only, and only for the term they actually occupied.

A consideration of the principles of the common law enables us to understand the full effect of such decisions. One in possession of lands of another may be in such possession (1) under a lease, written or oral, express or implied—the feudal relation of landlord and tenant exists, the tenant must pay rent—or he may be in such possession (2) without a lease—the relationship of landlord and tenant does not exist, there is no rent payable as such, but the law implies a contract to pay the landlord a reasonable sum for the use and occupation of his land.

Accordingly, when the common law was in all its glory, if a landlord sued in *assumpsit* for use and occupation, and it turned out that there was a lease, he was nonsuited—his action should have been in debt, or, if lease was under seal, in covenant, not *assumpsit*. The plaintiffs in *Reade v. Johnson* (1591), Cro. Eliz. 242, and *Clerk v. Palady* (1598), Cro. Eliz. 859 (not 809, as cited in Woodfall, p. 630), were victims to this error, with many other landlords. To aid the landlord, a statute was passed to get rid of this difficulty—one of the very many statutes to assist land-owners—few will be found till the other day to assist the poor man—but *beati possidentes*, and to him that hath shall be given.

This statute (1738), 11 Geo. II. ch. 19, by sec. 14, provided that, if an action were brought for use and occupation, the proof of a demise at the trial should not nonsuit the plaintiff, unless the demise should be by deed. Thereafter the prudent landlord, who had no lease under seal, always sued in *assumpsit*—if no demise appeared at the trial, he recovered for use and occupation—if a demise were proved, he recovered the amount of rent

reserved, that being used to fix the quantum of damages: *Beverley v. Lincoln Gas Light and Coke Co.* (1837), 6 A. & E. 829, at p. 839, note and cases cited therein; *Churchward v. Ford* (1857), 2 H. & N. 446 (not 7 H. & N., as Woodfall has it, p. 630, note (c)), *per* Bramwell, B., at p. 449.

Accordingly, the plaintiff in *Finlay v. Bristol and Exeter R.W. Co.*, 7 Ex. 409, brought his action in assumpsit for use and occupation. Of course he could not recover for use and occupation (proper), because the defendants did not use or occupy. He must then prove a demise. That he could not do—the defendants had never been tenants in the strict sense of that word—the relation of landlord and tenant never existed—during the first year the occupation was under an invalid agreement, not “a contract valid in law” (p. 413); when they held over for the following year, there was no change in the relation—the mere payment of money for the use of land does not itself create the relation of landlord and tenant. When then and how was this relationship established? There could be no satisfactory answer to this question, and the plaintiff failed: “no fresh interest was created at the expiration of the second year” (p. 417).

So in *Garland v. Northumberland Paper and Electric Co. Limited*, 31 O.R. 40, the defendant company occupied the premises under a verbal agreement for one year, paying rent—this did not create the relationship of landlord and tenant, and under the old practice an action would not lie for “rent,” i.e., in debt, but the action would have been for damages in assumpsit for use and occupation. The defendants by overholding and paying rent did not create the feudal relationship; and thereafter, as before, use and occupation was the appropriate and only form of action. Clearly this did not lie.

Our case is quite different—the relationship of landlord and tenant did exist because a valid lease was entered into and possession taken under it. How did this vanish? After the termination of the lease, the parties both considered that they were landlord and tenant—the plaintiff that the tenancy was from year to year, the defendants apparently that it was monthly: but both intended and believed that the relationship existed—and, so far as I can see, it did. If so, *cadit questio*.

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The case of *Doe dem. Pennington v. Taniere* (1848), 12 Q.B. 998, seems to be in point. There the Dean and Chapter of Canterbury were empowered by statute to grant leases for 99 years, provided that in each case there should be a covenant by the lessee to build. They leased to P. in 1778, without such covenant; the rent reserved was punctually paid in the time of the original Dean and several successors. Ejectment was brought, and the invalidity of the original lease set up. The Court of Queen's Bench—a very strong Court composed of Denman, C.J., Patteson, Coleridge, and Wightman, JJ.—held that, even if the lease were void, the “receipt and distribution (of the rent) were evidence from which, without proof of any instrument under seal, a demise from year to year might be presumed against them (i.e., the Dean and Chapter); the presumption in such a case being the same against a corporation aggregate as against an ordinary person.” Lord Denman, C.J., giving the judgment of the Court, says at p. 1013: “The presumption arising from such payment and acceptance is the same in the case of a corporation as of other persons.”

If a presumption is the same against a landlord corporation as against other persons, I am unable to understand how it is not the same against a tenant corporation.

Whether *Finlay v. Bristol and Exeter R.W. Co.* is well decided, we need not consider—Sir Frederick Pollock thinks it is no longer of authority: Pollock on Contracts, 8th ed., p. 157, note (i), and p. 163; see also note (3) in 86 R.R. 704, by J. G. Pease, referring to *South of Ireland Colliery Co. v. Waddle* (1868-9), L.R. 3 C.P. 463, L.R. 4 C.P. 617. If the *Finlay* case falls, the case in 31 O.R. falls with it. (In a case in this Divisional Court an opinion was expressed that *Garland v. North-umberland Paper and Electric Co. Limited* could not be supported: it was not however necessary to give judgment on this point, as the case went off on other grounds).

The present case is quite distinguishable from those relied on for the reasons already given.

I think that, a valid tenancy actually existing, the consequences of overholding and paying rent are the same for a corporation-tenant as any other.

*Appeal dismissed with costs.*

[LENNOX, J.]

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RE STEWART AND TOWN OF ST. MARY'S.

June 16.

*Municipal Corporations—By-law Limiting Pool-room Licenses in Town to one—Monopoly—Municipal Act, R.S.O. 1914, ch. 192, sec. 254—Effect of secs. 249, 250—Discretion—Motion to Quash—Refusal.*

A by-law passed by the council of a town of about 4,000 inhabitants, declaring that only one billiard- and pool-room license should be issued for a certain license-year, is not obnoxious to sec. 254 of the Municipal Act, R.S.O. 1914, ch. 192, providing against the creation of monopolies; and, it not being pretended that one license was not sufficient for the requirements of the town, or that the by-law was not passed in good faith, an application to quash it was refused—the large discretionary powers conferred by secs. 249 (2) and 250 of the Municipal Act being invoked.

*Re McCracken and United Townships of Sherborne et al.* (1911), 23 O.L.R. 81, distinguished.

MOTION by Charles Thomas Stewart to quash by-law No. 297 passed by the Council of the Town of St. Mary's, providing that the billiard- and pool-room licenses to be issued in the town for the license-year beginning on the 1st May, 1915, should be limited to one, and that for such license the licensee should pay \$72.

June 14. The motion was heard by LENNOX, J., in the Weekly Court at Toronto.

*J. C. Makins, K.C.*, for the applicant.

No one appeared for the town corporation.

June 16. LENNOX, J.:—By-law No. 297 enacts "that the billiard- and pool-room licenses to be issued in the town of St. Mary's for the ensuing license-year beginning on the 1st day of May, 1915, shall be limited to one," and that for such license the licensee shall pay \$72. The population of St. Mary's is about 4,000, and it is not pretended that one license is not sufficient for the requirements of the town, or that the by-law was not passed in good faith. The application was not opposed.

Not because of this, but by reason of the majority decision in *Re McCracken and United Townships of Sherborne et al.* (1911), 23 O.L.R. 81, the point of least resistance would apparently be reached by quashing the by-law. But that case and the cases upon which it was founded were all in respect of by-laws under the Liquor License Acts, and governed by considerations which

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I do not think arise here, and in all of them, except the *McCracken* case, bad faith was distinctly found. In none of them were the reasonable requirements of the municipality as a whole provided for, and the positive law that there shall be licenses to sell liquor, except upon the vote of the people to the contrary, was contravened—in each case it was substantially prohibition without compliance with the provisions of the statutes in that behalf, and sections of the municipality were discriminated against.

The applicant relies upon sec. 254 of the Municipal Act, R.S.O. 1914, ch. 192, providing against the creation of monopolies.\*

By sub-sec. 2 of sec. 249 of the Municipal Act, "a by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them." This is a new provision, introduced in 1913 by 3 & 4 Geo. V. ch. 43, sec. 249, sub-sec. (2), and will eliminate the difficulties referred to by Mr. Justice Riddell in the *McCracken* case at pp. 100, 101, arising out of the extensive supervisory powers exercised by English and Canadian Courts—a legislative sanction of the language of my brother Riddell when he says: "I venture to think that those on the spot elected by the people are better judges of what is or is not reasonable than His Majesty's Justices."

Aside from this, it has long been recognised here and in England that by-laws of municipalities ought to be "benevolently interpreted," that "they ought to be supported if possible," and that "the Court ought as far as possible to support by-laws issued by local authorities, unless it could clearly be seen that the by-law was made without jurisdiction or was obvi-

\*254. Subject to section 255, and to section 7 of the Ferries Act and to section 8 of the Ontario Telephone Act, a council shall not confer on any person the exclusive right of exercising, within the municipality, any trade, calling or business, or impose a special tax on any person exercising it, or require a license to be taken for exercising it, unless authorised or required by this or any other Act so to do; but the council may require a fee, not exceeding \$1. to be paid to the proper officer for a certificate of compliance with any regulations in regard to the trade, calling or business.

ously unreasonable:" *Walker v. Stretton* (1896), 12 Times L.R. 363; *Kruse v. Johnson*, [1898] 2 Q.B. 91, 14 Times L.R. 416; *Re McCracken and United Townships of Sherborne et al.*, 23 O.L.R. at p. 89; *Merritt v. City of Toronto* (1895), 22 A.R. 205, at p. 207.

Section 250 of the Municipal Act, in so far as it enacts that "every council may pass such by-laws and make such regulations for the health, safety, morality, and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act, as may be deemed expedient, and are not contrary to law," also only dates back to the Act of 3 & 4 Geo. V. ch. 43, sec. 250.

Taking into account the very large discretionary powers conferred upon the council by these provisions, and that incidental monopoly even where it is to be enjoyed by one individual or company is not foreign to our statutory municipal law, for instance, for the supply of light, heat, and power to the inhabitants under sec. 399, sub-secs. 17, 50, and 64, and the obvious case of an exclusive franchise to a street railway company, I cannot read sec. 254 as necessarily compelling a municipal council to issue licenses for a multitude of pool-rooms, slaughter-houses, pounds, and livery-stables within the municipality—some of them noxious and offensive, although necessary or proper to a limited degree—beyond the reasonable requirements of the municipality, even if it may be argued that the reasonable and proper limitation fixed by the council may incidentally and unavoidably result in individual monopoly. It may be still monopoly if two or even more licenses are provided for. One license for 4,000 people is no more a monopoly than two licenses in a town of 10,000 inhabitants. There is no question of *practical prohibition* here, as in *Rowland v. Town of Collingwood* (1908), 16 O.L.R. 272. The people must have hotels until the people say otherwise at the polls—but the council is not bound to provide for pool-rooms; and, having provided for and issued two licenses, can cancel one or both of them. They can regulate charges as they see fit, and by fixing a sufficiently high license fee can prevent unreasonable profit to the licensee and secure revenue for the municipality at the same time.

The motion will be dismissed, and, the council not appearing, there need be no order as to costs.

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[APPELLATE DIVISION.]

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## RE SHARP AND VILLAGE OF HOLLAND LANDING.

*Municipal Corporations—Local Option By-law—Motion to Quash—Discretion—Liquor License Act, R.S.O. 1914, ch. 215, sec. 139—Voting on By-law—Irregularities—Curative Clause of Municipal Act, R.S.O. 1914, ch. 192, sec. 150—“Did not Affect the Result”—Onus—Voters’ List—Use of Certified instead of Special List—Effect of—Voters’ Lists Act, R.S.O. 1914, ch. 6, sec. 24—Municipal Act, sec. 266—Voters Disqualified as Non-resident—Effect on Result—Failure to Shew—Departure from Principles Laid down in Act—Omission of Description of Voter—Residence in Municipality—Premature Third Reading of By-law—Subsequent Reading—Meeting of Council—Petition for By-law.*

Upon a motion to quash a local option by-law, it was held by HODGINS, J.A.:—

- (1) That the power of the Court as to quashing local option by-laws is, since the addition in 1908, by 8 Edw. VII. ch. 54, sec. 11, of sec. 143a to the Liquor License Act, R.S.O. 1897, ch. 245, practically vested in the Executive of the Province: sec. 139 of the present Liquor License Act, R.S.O. 1914, ch. 215: while the Court is still bound to decide according to law and may yet quash a by-law, the effect of its decision is dependent on the assent of the Minister.
- (2) That, under the curative clause of the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 204, the validity of the by-law was saved if it appeared to the tribunal having cognizance of the question that non-compliance with the provisions of the Act, mistake, or irregularity “did not affect the result”—which meant affirmative proof, or conviction from the proved circumstances, that the result was not affected; but under the corresponding section of the Municipal Act of 1913, now R.S.O. 1914, ch. 192, sec. 150, the onus upon those supporting the by-law is confined to shewing compliance with the principles laid down in the Act, while upon the applicant is laid the burden of shewing that the result was affected by the proved irregularities.
- (3) That the use in the voting on the by-law of a list prepared in accordance with the Voters’ Lists Act, R.S.O. 1914, ch. 6, sec. 24, and certified by the County Court Judge, came within sec. 150 as a matter preliminary to the poll; and an objection that the voters’ list used was not that required by sec. 266 of the present Municipal Act, failed. The intention of the Municipal Act is, that a special voters’ list, founded upon the certified voters’ list, shall be provided, and the Liquor License Act also deals with the special list as binding except as to those who cannot shew the necessary length of residence before the vote (R.S.O. 1914, ch. 215, sec. 137, sub-sec. 2). The objection also failed because nothing appeared to indicate the effect of the use of the list upon the result of the vote.

*Re Ryan and Town of Alliston* (1910), 21 O.L.R. 582, 22 O.L.R. 200, and *Re Sinclair and Town of Owen Sound* (1906), 13 O.L.R. 447, applied.

- (4) That, before the statute of 1913 (3 & 4 Geo. V. ch. 43, sec. 150), the rule was to deduct from the votes in favour of the by-law the votes of all disqualified persons who voted, and the reason was that it could not be made to appear to the Court that the result would not be affected; now, it must actually appear that the result was in fact affected: and, as that cannot be made to appear without shewing how these persons voted, there is no reason why their votes should be deducted. If only isolated votes, of a class of voters entitled to vote, are tendered by persons on the voters’ list, and are received as prescribed by the Act, then, although the voters are in fact unqualified, and their votes subject to scrutiny and rejection, the whole vote is not to be set aside as for a departure from the scheme laid down in the Act.

(5) That—the result of the vote being that 5 votes must be struck off those cast in favour of the by-law in order to destroy the majority, and 7 votes being objected to on the ground that the voters were disqualified in respect of residence or length of residence, and one on the ground that the voter's description was not given—it was necessary to inquire into the qualifications of 3 only; for, if the remaining votes were invalid, they could not be said affirmatively to have affected the result of the voting; and the votes attacked were not, in number and circumstances, sufficient to shew that the principles laid down in the Act had been departed from.

(6) That 2 of the 3 votes selected for examination were good. The vote of one whose name is on the voters' list, although his description is not given, cannot be disallowed: *Re Schumacher and Town of Chesley* (1910), 21 O.L.R. 522; *Re Ellis and Town of Renfrew* (1910-11), 21 O.L.R. 74, 23 O.L.R. 427. A voter whose house is in the municipality, part of the house being rented and part containing his furniture, must be regarded as "resident" in the municipality.

(7) That the following objections to the by-law were untenable: that the by-law was improperly given a third reading on a date less than two weeks from the declaration of the result by the clerk; that the council's power was exhausted by the improper third reading; that a meeting of the municipal council was illegal by reason of not being summoned by the clerk; and that the council was not bound to pass the by-law, there being no properly signed petition.

On appeal, the order of HODGINS, J.A., dismissing the motion, was affirmed.

MOTION by one Sharp to quash a local option by-law of the Village of Holland Landing.

April 21. The motion was heard by HODGINS, J.A., in the Weekly Court at Toronto.

*J. B. Mackenzie*, for the applicant.

*W. E. Raney*, K.C., for the village corporation, the respondent.

April 30. HODGINS, J.A.:—The power of the Court as to quashing by-laws is now, so far as local option by-laws are concerned, practically transferred to the Executive of the Province. This change was introduced in 1908,\* and, while the

\*By sec. 11 of 8 Edw. VII. ch. 54, an Act to amend the Liquor License Act, sec. 143a is added, as follows: "143a. Where a by-law submitted to the electors under the provisions of sub-section 1 of section 141 of this Act is declared by the Clerk or other Returning Officer to have received the assent of three-fifths of the electors voting thereon, and is after such declaration quashed or set aside, or held to be invalid or illegal, or where such by-law after having been declared not to have received the assent of three-fifths of the electors, is held upon a scrutiny to have received such assent and is subsequently quashed or held to be invalid or illegal, no tavern or shop license shall be issued in the municipality in which the by-law was submitted after the date of such submission and until the first day of May in the year in which a repealing by-law might have been submitted to the electors had the first mentioned by-law been declared valid, without the written consent of the Minister first had and obtained. This section shall apply to all by-laws submitted to the electors since the 31st day of December, 1906." See now sec. 139 of the Liquor License Act, R.S.O. 1914, ch. 215.

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Court is still bound to decide according to law and may yet quash a by-law, the effect of its decision is dependent on the assent of the Minister. This was a pretty plain intimation of the legislative will. But an amendment to the Municipal Act by 3 & 4 Geo. V. ch. 43, sec. 150 (now R.S.O. 1914, ch. 192, sec. 150), has, to my mind, made a radical change with regard to the effect of objections to these by-laws.

The former section, known as the curative section, read as follows (1903, 3 Edw. VII. ch. 19, sec. 204): "No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the Schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election. R.S.O. 1897, ch. 223, sec. 204."

The present one is as follows: "150. No election shall be or be declared to be invalid—

"(a) For non-compliance with the provisions of this Act as to the taking of the poll or anything preliminary thereto or as to the counting of the votes; or

"(b) By reason of mistake in the use of the prescribed forms; or

"(c) By reason of any mistake or irregularity in the proceedings at or in relation to the election;  
 "if it appears to the tribunal by which the validity of the election or any proceeding in relation to it is to be determined that the election was conducted in accordance with the principles laid down in this Act, and it does not appear that such non-compliance, mistake or irregularity affected the result of the election. 3 Edw. VII. ch. 19, sec. 204, amended."

The practical difference in the two enactments is seen in three directions. The former statutory provision applied to the taking of the poll; the present one also includes "anything preliminary thereto." Then, the words "by reason of any irre-

gularity" are replaced by the expression "by reason of any mistake or irregularity in the proceedings at or in relation to" the vote.

The important change, however, is this. Under the previous clause the validity of the by-law was saved if it appeared to the tribunal having cognizance of the question that "such non-compliance, mistake or irregularity did not affect the result." This meant affirmative proof, or conviction from the proved circumstances, that the result was not affected. All the Judges who decided *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317 (except Mulock, C.J., who expressed no opinion on the point), dwell upon the fact that the onus, under the provisions of the statute, was upon the respondent to prove two things—compliance with the principles laid down in the Act, and that the irregularities did not affect the result.

Under the present section it is sufficient to uphold the by-law that there is no proof that the result was affected by the non-compliance, mistake, or irregularity. If the applicant does not prove it and it does not otherwise appear, then, provided the principles of the Act governed the conduct of the vote, the by-law stands. In other words, the onus upon those supporting the by-law is confined to shewing compliance with the principles laid down in the Act, while upon the applicant is laid the burden of shewing that the result was affected by the proved irregularities.

This seems to me to render the task of upsetting a by-law a formidable one. Formerly, proof of irregularities unsettled the basis on which the vote rested, and the Court had to be satisfied in some way that the result was not affected thereby. Now, when irregularities are proved, the Court is not concerned with their effect, subject always to compliance with the principles laid down in the Act, unless and until it is made to appear that those irregularities did in fact affect the result. In my view, the Legislature has at last so provided that the Courts will not in the future have to busy themselves annually in considering the mass of infinitesimal and unimportant suggested improprieties relied on to defeat every local option vote.

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From this new standpoint the objections raised in the present application must be considered. I deal only with those actually argued.

Several votes were challenged, but I will first deal with the objection that the voters' list used was not that required by sec. 266, R.S.O. 1914, ch. 192, formerly 3 & 4 Geo. V. ch. 43, sec. 266.

The Liquor License Act, R.S.O. 1914, ch. 215, sec. 137, subsec. 2, provides: "No person shall vote upon any proposed by-law submitted to the electors under this section who is not at the date of taking the vote and has not been for three months before that date a *bonâ fide* resident of the municipality to which the proposed by-law relates, and as to such persons the certified list mentioned in section 24 of the Ontario Voters' Lists Act shall not be final and conclusive. 1 Geo. V. ch. 64, secs. 21, 23."

The Voters' Lists Act there referred to is R.S.O. 1914, ch. 6, sec. 24, formerly 2 Geo. V. ch. 4, sec. 3. A list prepared in accordance with that Act was signed by the Judge and used in this election.

As the Liquor License Act allows all the electors of the municipality to vote, I should have doubted whether sec. 266 applied, but for its concluding paragraph. But, as neither the voters' list nor the special list is final on the point raised with regard to these votes, I think the use of this list, under the circumstances, comes well within sec. 150 as a matter preliminary to the poll. The intention of the Municipal Act is to provide, for use, a voters' list, founded upon the certified voters' list, and the Liquor License Act also deals with the latter list as binding, except as to those who cannot shew the necessary length of residence before the vote. The objection seems well covered in principle by *Re Ryan and Town of Alliston* (1910), 21 O.L.R. 582, 22 O.L.R. 200, and must be disallowed. Reference may also be made on this point to *Re Sinclair and Town of Owen Sound* (1906), 13 O.L.R. 447.

Nothing appears to indicate the effect this will have upon the result of the vote; and the objection fails as well upon that point.

There are 7 electors in all whose right to vote is questioned

as being disqualified in point of residence or length of residence, and one, William McClure, because his description does not appear in the voters' list. The former are Isaac Walters, Abraham Oster, George Oster, Wesley Pegg, Arthur Pegg, Stanley Morning, and John Butterfield. The vote stood 63 for and 39 against, so that 5 votes have to be struck off those in favour of the by-law to destroy the majority. But, if I come to the conclusion that these 7 votes are bad, where does that leave the matter? I am unable to inquire how these men voted; and the reason underlying the rule of subtraction hitherto followed has, in consequence of the amendment I have mentioned, disappeared. That rule was to deduct them from the votes in favour of the by-law, and the reason was that it could not be made to appear to the Court that the result would not be affected: *Re Leahy and Village of Lakefield* (1906), 8 O.W.R. 743; *Re Gerow and Township of Pickering* (1906), 12 O.L.R. 545; *Re Sinclair and Town of Owen Sound* (1906), 12 O.L.R. 488; *Re Cleary and Township of Nepean* (1907), 14 O.L.R. 392; *Re Ellis and Town of Renfrew* (1910), 21 O.L.R. 74.

Now, it must actually appear that the result was in fact affected; and, if the contentions now made by the applicant are resolved in his favour, there still remains the question, Why should they be deducted from those in favour of the by-law?

While the statute remained as it was, a reason existed, namely, the possibility of the majority in favour being made up of illegal votes. Now, while that possibility still exists, it remains a possibility only, and it cannot be made to appear that the result was really affected. I do not say that, if a class of voters is disfranchised or wrongfully enfranchised, the vote could be said to be conducted according to the principles laid down in the Act: *In re Pounder and Village of Winchester* (1892), 19 A.R. 684. But, if only isolated votes here or there, of a class of voters properly entitled to vote, are tendered by persons on the voters' list, and they are received as prescribed by the Act, then, although the voters are in fact unqualified, and their votes are subject, therefore, to scrutiny and rejection, I cannot think that the whole vote must be set aside as for a departure from the scheme laid down in the Act.

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For this reason, I propose to examine, following the precedent set by Mr. Justice Riddell in *Re Ellis and Town of Renfrew*, 21 O.L.R. 74, only three votes, leaving the others to depend on the view I have expressed—that, if held to be invalid, they cannot be said affirmatively to have affected the result of the vote, and that the attacked votes, in number and circumstances, are not sufficient to satisfy me that the principles laid down in the Act have been departed from.

Isaac Walters' vote is admittedly bad.

William McClure is on the voters' list, but his description is not given. He is named therein, and his vote cannot be disallowed: *Re Schumacher and Town of Chesley* (1910), 21 O.L.R. 522; *Re Ellis and Town of Renfrew*, 21 O.L.R. 74; S.C. in appeal (1911), 23 O.L.R. 427.

John Butterfield's residence is in Holland Landing, where his house is. Part of it is rented, and part of it contains his furniture. Under these circumstances, it must be held that he is resident.

Objection was made that the by-law was improperly given a third reading on a date less than two weeks from the declaration of the result by the clerk; that the council's power was exhausted by such improper third reading; that the meeting on the 6th February, 1915, was illegal by reason of not being summoned by the clerk; and that the council was not bound to pass the by-law, there being no properly signed petition.

The first point is, I think, covered by authority which is against the objection. The second and third I do not give effect to. They seem to carry their own answer. The last objection I do not consider, as, whether the petition was sufficiently signed or not, the council did pass the by-law. To determine whether it was their duty or not so to do, is not important.

The objections numbered 4, 6, 7, 8, 9, 11, and 12, were not argued.

The result is the dismissal of the application with costs.

The applicant appealed from the order of HODGINS, J.A., dismissing the application.

June 16. The appeal was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., LATCHFORD and KELLY, JJ.

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*J. B. Mackenzie*, for the appellant. Section 204 of the Municipal Act of 1903 was changed in the Municipal Act of 1913: see now sec. 150 of R.S.O. 1914, ch. 192. The "result of the election" must be affected. For the meaning of "result of the election," see *The Islington Division Case* (1901), 5 O'M. & H. 120, at p. 125. The votes of non-residents objected to by the applicant should be struck off. The following cases may be referred to in regard to residence and non-residence: *Regina v. Glossop Union Guardians* (1866), L.R. 1 Q.B. 227; *Ford v. Drew* (1879), 5 C.P.D. 59, at pp. 62, 63; *Atkinson v. Collard* (1885), 16 Q.B.D. 254; *Re Sturmer and Town of Beaverton* (1911), 24 O.L.R. 65, at p. 74; *Spittall v. Brook* (1886), 18 Q.B.D. 426; *Beal v. Town Clerk of Exeter* (1887), 20 Q.B.D. 300. Under sec. 266 of the present Municipal Act, there must be a separate list of voters, and see the Assessment Act, R.S.O. 1914, ch. 195, sec. 25 (d). In regard to the voter taking the oath, *Wilson v. Manes* (1899), 26 A.R. 398, is not now good law: see R.S.O. 1914, ch. 215, sec. 137 (12). The object of the enactment is the elimination of those who have no right to vote: *Re Brampton Local Option By-law* (1914), 5 O.W.N. 644. The third reading of the by-law was too soon: see *In re Duncan and Town of Midland* (1908), 16 O.L.R. 132, the effect of which is altered by sec. 280 (3) of R.S.O. 1914, ch. 192—an express prohibition. See also *In re Inglis and City of Toronto* (1904), 8 O.L.R. 570, at p. 574. The by-law, in any case, is bad on its face, as it has neither seal nor signature: *Canada Atlantic R.W. Co. v. City of Ottawa* (1885-6), 12 A.R. 234, 12 S.C.R. 365.

*W. E. Raney*, K.C., and *E. F. Raney*, for the respondent. The councillors did what they could to rectify the by-law by giving it another reading: see *In re Duncan and Town of Midland*, 16 O.L.R. at p. 155. Compare sec. 204 of the Municipal Act of 1903 with sec. 150 of the present Act; the onus is shifted; votes cannot now be taken from the winning side; the section is merely curative. Section 24 of the Voters' Lists Act, R.S.O. 1914, ch. 6, and *Re Sturmer and Town of Beaverton*, *supra*, will apply to one of the disputed votes.

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*Mackenzie*, in reply, on the question of the dwelling giving residence qualification, referred to *In re North Renfrew* (1904), 7 O.L.R. 204; *Regina ex rel. Thompson v. Dinnin* (1898), 3 Terr. L.R. 112; *Hodgins on Voters' Lists*, 2nd ed., pp. 15, 176, 209.

June 18. The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—We decided on the argument that the votes of the two Osters were not successfully impeached, and we do not find that there was evidence or any legal ground to kill a sufficient number of other votes, without reference to the fact that it cannot appear how any of them voted.

As to the alleged defect in the third reading, if the council thought a new third reading was necessary, in view of the fact that sufficient time had not been allowed to elapse, it was competent for them to give it.

As to there not having been a separate list of voters, we are of opinion that this was not left undone with a view of preventing any one from voting. The list was the same, and the result could not be in any way affected.

The appeal is dismissed with costs.

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[MIDDLETON, J.]

June 21.

BRYMER V. THOMPSON.

*Landlord and Tenant—Lease of Flat in Building—Implied Stipulation to Furnish Heat—Collateral Contract—Statute of Frauds—Damages for Inadequate Heating.*

The top-flat of a building was leased by the defendant to the plaintiff as "steam-heated." The written lease, signed by the plaintiff, made no mention of heating; steam-heating was in fact provided, but was inadequate, and the plaintiff sued for damages for breach of the implied agreement to supply adequate heat:—

*Held*, that there was an implied collateral promise or contract, and a breach thereof; that the action lay, notwithstanding the relationship of landlord and tenant; that the Statute of Frauds was not an answer; and that the plaintiff was entitled to recover damages in respect of the loss of time of men employed by him and the extra cost of attempting to heat the flat, and also damages for the general loss and inconvenience resulting from the breach of the implied contract.

*Hamlyn & Co. v. Wood & Co.*, [1891] 2 K.B. 488, *Ex p. Ford* (1885), 16 Q.B.D. 305, *Lamb v. Evans*, [1893] 1 Ch. 218, and *De Lassalle v. Guildford*, [1901] 2 K.B. 215, applied and followed.

ACTION by the lessee of the top-flat of a building against the lessor to recover damages caused by the defendant's failure to provide adequate heating.

June 18. The action was tried before MIDDLETON, J., without a jury, at Toronto.

*G. N. Shaver*, for the plaintiff.

*J. W. Bain*, K.C., and *J. M. Forgie*, for the defendant.

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June 21. MIDDLETON, J.:—Notwithstanding Mr. Bain's emphatic views, I think this case is simple, both upon the law and facts. The defendant owns the property known as 115 King street east. The property was in her husband's hands for management. As her attorney, he leased the basement and ground-floor to Mr. McArthur, and the lease contains a covenant on the part of McArthur to heat not only the floors leased but the remaining flats of the building. In consideration of this, the defendant agreed to pay for one-third of the fuel consumed. After the making of this lease, the defendant placed the leasing of the remaining floors in the hands of a real estate agent, who listed the properties as "steam-heated flats."

The only system of heating provided in the building was steam-heating; the steam for the entire building being generated in two boilers in the portion leased to McArthur. There were coils for heating purposes throughout the entire building, and the system provided was entirely adequate for the contemplated purpose.

The plaintiff leased the top-flat of the building from the agent as a steam-heated flat, and it was undoubtedly the intention of all parties that the demised premises should be heated by the landlord. Mr. Thompson prepared a written lease of the flat, but the lease makes no mention of heating. This lease was signed by the plaintiff. During the currency of the lease, Thompson, or McArthur for him, did supply steam-heat, but the steam supplied was inadequate. This arose not from any defect in the heating plant but from inefficient operation. The plaintiff required to use his premises from the hour of 8 a.m. Steam was not supplied from the boiler in sufficient volume to reach the top-flat, and afford any appreciable heating, until after 9 o'clock. The result was that the workmen were unable to work during the first hour. These men had to be paid, as

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they were there ready to work; but their services were worthless, as they could not work owing to the low temperature of the factory.

Complaint was made to Thompson, and he in his turn complained to McArthur, but no satisfactory remedy was applied. This action is to recover damages. The answer made is that, there being in the written lease, or agreement for lease, as the case may be, no agreement to supply heat, there can be no recovery.

There is no merit whatever in the defence, and the evidence of the husband in seeking to evade liability impressed me as being disingenuous in the extreme.

Lord Esher, in *Hamlyn & Co. v. Wood & Co.*, [1891] 2 K.B. 488, asserts the rule that there is the right to imply a stipulation in a written contract where, "on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist." This is similar to what the same Judge said in *Ex p. Ford* (1885), 16 Q.B.D. 305: "It seems to me that whenever circumstances exist in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted." It is similarly said by Bowen, L.J., in *Lamb v. Evans*, [1893] 1 Ch. 218: "What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile."

I think there was here an implied promise and contract on the part of the landlord that the premises leased should be adequately and sufficiently heated; and, furthermore, I think that there is nothing in the fact that the case is one between landlord and tenant to render the law upon which I am acting inapplicable. *De Lassalle v. Guildford*, [1901] 2 K.B. 215, determines that a tenant can sue upon a collateral verbal warranty, and puts an end to the suggestion in earlier cases that there can be

no suit on a warranty unless it is in the lease. *A fortiori*, there can be an action upon a collateral contract such as this.

Nor does the Statute of Frauds afford any answer, even if pleaded—and here it is not; for it is laid down in Halsbury's *Laws of England*, vol. 7, p. 383, that where there are two distinct agreements, one of which is and the other is not within the statute, the promise which is not required to be in writing to be within the statute may be enforced, even though it is not evidenced by a writing.

The claim for damages is put forth in somewhat peculiar form. The items for lost time of the men and the extra cost of attempting to heat by the gas-furnace are properly pleaded as special damages. The third item is probably not sufficiently pleaded as a claim for special damages with respect to lost business, and I propose to treat it as a claim with respect to damages for the general loss and inconvenience resulting from the breach of the implied contract.

I cannot help feeling that the damages claimed ought to be somewhat reduced. Considering the matter as best I can from all aspects, I think \$750 is not an unfair amount to allow.

There will therefore be judgment for the plaintiff for this sum, with costs.

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## RE WINDATT AND GEORGIAN BAY AND SEABOARD R.W. Co.

*Railway—Expropriation of Land—Railway Act, R.S.C. 1906, ch. 37, secs. 199, 204—Compensation—Arbitration—Award Set aside because of Misconduct of Arbitrators—Costs of Arbitration—Jurisdiction.*

An award under the Railway Act, R.S.C. 1906, ch. 37, fixing the amount to be paid by a railway company to a land-owner as compensation for land taken for the railway, was set aside by the Court, on the ground of the misconduct of the arbitrators, upon motions made by both the company and the land-owner, but without costs, as both parties had attacked the award, and neither had attempted to support it.

It was *held*, that the Court had no jurisdiction over the costs of the proceedings before the arbitrators.

*In re Pattullo and Town of Orangeville* (1899), 31 O.R. 192, distinguished.

The company had, before the arbitration, offered as compensation a sum of money, which the land-owner refused to accept. The company was in possession of the land; no money had been paid to the land-owner nor into Court; and, after the award was set aside, no further proceedings were taken until the company moved before a Judge of the Supreme Court of Ontario for an appointment for the taxation of the costs of the arbitration:—

*Held*, refusing that application, that the case did not fall within sec. 204 of the Act, for there was an award within the time limited, and the fact that it was invalid by reason of what was done by the arbitrators did not render it a nullity so that it could be said that there never was any award.

And *held*, that sec. 199 is predicated upon the existence of a valid award, and is intended to apply where the sum awarded does not exceed the sum offered; and the compensation there referred to is the compensation fixed or determined under the Act.

MOTIONS by both parties—the land-owner and the railway company—to set aside an award of three arbitrators, dated the 25th June, 1915, under the Dominion Railway Act, R.S.C. 1906, ch. 37, fixing the compensation to be paid by the railway company for land expropriated.

November 18, 1912. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

N. W. Rowell, K.C., for the land-owner.

Shirley Denison, K.C., for the railway company.

November 25, 1912. MIDDLETON, J.:—Both parties attack the award upon the ground of the misconduct of the arbitrators,

consisting of *ex parte* interviews looking towards the bringing about of an adjustment of the rights of the parties in a somewhat difficult situation.

It is conceded by counsel that, in view of what took place, the award cannot stand; and I have, therefore, no course open to me but to set aside the award. As each party has attacked the award, and neither has attempted to support it, I do so without costs.

Counsel for the land-owner requests that I make some provision respecting the costs of the arbitration. Counsel for the railway company objects to my doing so, on the ground that I have no jurisdiction.

I have come to the conclusion that I have no jurisdiction; and, even if I had, I would not, in the circumstances, make any order, but would simply leave the parties to their legal rights.

There is no doubt that I have jurisdiction over the costs of proceedings in the High Court; but I can find nothing upon which to found any jurisdiction over the costs of the proceedings before the arbitrators. I am referred to *In re Pattullo and Town of Orangeville* (1899), 31 O.R. 192, as shewing that I have authority. That case does not establish this, because the motion there was under the provisions of the Municipal Act, where authority is expressly given to the Judge to vary the award; and this is what was done by the Chief Justice.

The whole arbitration concerns the value of a small parcel of land. The award is \$1,300, which is much more than the amount really in dispute. The evidence taken before the arbitrators covers nearly 300 pages.

If the award is wrong, an appeal will lie—but both parties elect to set aside the award, though there was certainly no moral misconduct on the part of the third arbitrator, who, in his desire to end an unreasonably expensive litigation, may have technically erred.

The railway company had, before the arbitration, offered a sum of money as compensation, which the land-owner refused to accept. The company had taken possession of the land, and remained in possession. No money had been paid by the railway

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company to the land-owner nor into Court. After the award was set aside, no further proceedings were taken until, in June, 1915, the railway company (as preliminary to an application for leave to pay money into Court so as to make title under sec. 210 of the Railway Act\*) served upon the land-owner notice of an application for an appointment for the taxation of the company's costs of the arbitration.

June 18, 1915. The motion was heard by MIDDLETON, J., in Chambers.

*J. D. Spence*, for the railway company.

No one appeared for the land-owner.

A memorandum submitted by counsel for the railway company was in part as follows:—

The time for making the award expired in August, 1912. Both parties served notice of appeal, but these notices were afterwards abandoned, and both parties moved to set aside the award. The railway company's application is dated the 24th October, 1912; Windatt's application the 29th October, 1912. An order was made on the 25th November, 1912, setting aside the award.

By sec. 155 of the Railway Act, compensation for lands taken or other exercised powers shall be made, "in the manner herein and in the special Act provided, to all persons interested." There is no other procedure for determining or recovering the compensation to be paid than that which the Act provides.

Section 194 provides that the notice of arbitration "shall be accompanied by the certificate of a sworn surveyor . . . who is a disinterested person, which certificate shall state,— . . . (c) that the sum so offered" (in the notice) "is, in his opinion, a fair compensation for the land and damages."

Section 204 provides that "the arbitrators, at the first meeting after their appointment . . . shall fix a day on or before which the award shall be made, and if the same is not made on or before such day, or some other day to which the time for mak-

\*Until the costs are taxed and deducted under sec. 199, the company cannot determine what amount to tender and pay into Court.

ing it has, either by the consent of the parties, or by resolution of the arbitrators . . . been prolonged, then the sum offered by the company, as aforesaid, shall be the compensation to be paid by the company."

Section 199: "If, by any award of the arbitrators . . . made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation. 2. The amount of the costs, if not agreed upon, may be taxed by the judge."

Section 204 has been considered in *Shannon v. Montreal Park and Island R.W. Co.* (1898), 28 S.C.R. 374; *Desormeaux v. Village of Ste. Thérèse de Blainville* (1910), 43 S.C.R. 82; *Wynnes v. Montreal Park and Island R.W. Co.* (1900), Q.R. 9 Q.B. 498; *Beaudet v. North Shore R.W. Co.* (1887), 15 S.C.R. 44; and in *Re Horseshoe Quarry Co. and St. Mary's and Western Ontario R.W. Co.* (1900), 22 O.L.R. 429.

There is no case in which any doubt is cast upon the proposition that, where the arbitrators have actually fixed a time within which an award shall be made, and have failed, for any reason (not bringing sec. 206 into play), to make an award within the time so fixed or extended by resolution, the provisions of sec. 204, fixing the amount offered by the company and certified by the surveyor as the compensation to be paid, become absolute.

The whole question is: did the arbitrators fix a time, and did that time expire without an award having been made?

It is submitted that in this case no award was made. An "award" means a valid award: *Russell's Law of Arbitration*, 7th ed., p. 35; *The Queen v. Grant* (1849), 14 Q.B. 43; *Bache v. Billingham*, [1894] 1 Q.B. 107; *Fisher v. Pimbley* (1809), 11 East 188, 192; *Gisborne v. Hart* (1839), 5 M. & W. 50; *Dresser v. Stansfield* (1845), 14 M. & W. 822, 830. The so-called award signed by two of the arbitrators was attacked by both parties, and has been set aside. The land-owner alleged against it that the arbitrator of the railway company refused to

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concur in it, and that the owner's arbitrator, though he signed the document, did not in fact concur, for the award did not express his independent judgment, and his signature was obtained by a sort of duress on the part of the third arbitrator, who told him that, if he refused to sign, the arbitration would fail. Surely this is an allegation that there never was an award. Assuming the award to have been set aside for this misconduct, we must also assume that the owner's arbitrator should, by acting differently, have allowed the result to happen which the third arbitrator indicated, namely, that the arbitration should fail. The result of such failure would have been the application of the last clause of sec. 204; and there can be no harshness in placing the owner in the same situation as a result of setting aside the award as he would have been in if the order had never been made necessary by the impropriety alleged

Section 204 was passed (a) for the purpose of preventing unduly prolonged proceedings, and (b) preventing an absolute dead-lock. There is no power to remit to the arbitrators: *Re Mc-Alpine and Lake Erie and Detroit River R.W. Co.* (1902), 3 O.L.R. 230. There is no provision for appointing a new board of arbitrators in place of them. They are *functi officio* by their own act in fixing a limit of time within which they must complete their duties; and, unless sec. 204 is applied, there is no method by which the land-owner can get compensation to any amount, or the railway company can perfect its title to the land. Whatever may be the supposed hardships to result from the application of this section, there is no other way out of the difficulty, and the provision that the surveyor giving the certificate under sec. 194 shall be disinterested and sworn, must be taken as intended to safeguard the owner, as far as possible, in such a situation as has arisen in this case.

Under sec. 199, there are only two events. If there shall be an award exceeding the offer, the company shall pay the costs of the arbitration. If otherwise (i.e., in any other circumstances whatsoever), the costs shall be borne by the opposite party. There is no award, and therefore no award exceeding the offer. The alternative case is the one we have to deal with.

June 22. MIDDLETON, J.:—An application made upon notice for an appointment for the taxation of the costs of an arbitration.

The case was before me on the 25th November, 1912. The railway company offered some \$1,100 for the land. A prolonged and most expensive arbitration took place, with the result of an award of \$1,300 on the 25th June, 1912. Both parties moved to set aside the award on the ground of misconduct on the part of the arbitrators, who had interviewed the parties and *ex parte* endeavoured to bring about a settlement.

The award was set aside without costs, and I then held that I had no jurisdiction to deal with the costs of the arbitration. Nothing has since been done, and this application has now been made.

Reliance is placed upon sec. 204 of the statute, which provides that, where an award is not made within a time to be fixed by the arbitrators, the sum offered by the company shall be the compensation to be paid for the land taken.

I do not think that this case falls within sec. 204, for here there was an award within the time limited, and the fact that the award was invalid by reason of what was done by the arbitrators does not render it a nullity so that there can be said never to have been any award.

Reliance is also placed upon sec. 199. By that section, the railway company is directed to pay the costs of the arbitration if the sum awarded exceeds the sum offered, "but if otherwise they shall be borne by the opposite party and be deducted from the compensation."

I think this section is predicated upon the existence of a valid award, and is intended to apply where the sum awarded does not exceed the sum offered; and I think the compensation referred to in that section is the compensation fixed or determined under the Act.

For these reasons, I think I should not give the appointment sought.

No doubt there is much difficulty in ascertaining how the situation which has now arisen can be worked out, in view of

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the refusal of the land-owner to co-operate in any way. The railway company is in possession of the lands; it may have no title; the money is not in Court; and the land-owner apparently would rather leave it in the hands of the company than accept a sum which he deems inadequate.

The parties must work out the situation themselves, or leave it to the operation of the healing hand of Time and the Statute of Limitations.

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## LOWERY AND GORING V. BOOTH.

*Water—Rights of Lumbermen Floating Logs in River—Injury to Dam—“Unnecessary Damage”—Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 4—Negligence—Ordinary Course of Business.*

By the Rivers and Streams Act, R.S.O. 1914, ch. 130, there is conferred upon lumbermen the right to use streams for flotation of timber with immunity from damage for injuries done to the property of others unless it can be found affirmatively that the operations were conducted negligently and with reckless disregard of the rights of others. “Unnecessary damage,” in sec. 4 of the Act, means damage which could be avoided by the exercise of reasonable care and caution.

In this case, where a cofferdam, built by the plaintiffs in the bed of the Montreal river, was destroyed by the defendant's logs passing down the stream, it was held, that there had not been such disregard of the plaintiffs' rights as to constitute “unnecessary damage.” The utmost that could be required of the defendant was that he should refrain from doing an unnecessary negligent act; he was not called upon to erect any structure or to protect the plaintiffs' dam by glance-booms or similar devices.

*Thompson v. Hill* (1870), L.R. 5 C.P. 564, applied.

*Seemle*, that damage cannot be said to be unnecessary when it is occasioned by what is done in the ordinary course of the business contemplated by the statute.

ACTION for damages for the destruction of a cofferdam.

June 14 and 15. The action was tried before MIDDLETON, J., without a jury, at North Bay.

*R. McKay*, K.C., and *H. F. Upper*, for the plaintiffs.

*G. F. Shepley*, K.C., and *Wentworth Greene*, for the defendant.

June 22. MIDDLETON, J.:—The plaintiffs sue to recover damages arising from the destruction of a certain cofferdam built

in the bed of the Montreal river—destroyed, it is said, during the passage of the defendant's logs down the stream in May, 1911.

The Dominion of Canada, in connection with a scheme called the Upper Ottawa Storage, desired to construct a dam and sluiceways across the Montreal river at Latchford. A contract was made for the necessary work between His Majesty, represented by the Minister of Public Works, and Messrs. Sinclair and Campbell. This contract bears date the 28th January, 1910. Afterwards, with the assent of the Minister, the contract was taken over and assumed by the plaintiffs.

The work contemplated by the contract consisted of abutments, one on each bank of the river, and concrete piers to be erected in the bed of the stream. These piers, were to be so constructed that stop-logs could be inserted, and in this way the water would be held. The location of the proposed dam was some 500 or 600 feet upstream from the railway bridge at Latchford.

Prior to the occurrences giving rise to this action, the abutments on each side of the river had been constructed, two piers had been placed on the south side of the river, and a cofferdam had been erected on the north side of the river, extending a considerable distance into the stream, for the purpose of enabling three piers to be erected on the north side. One pier had already been constructed.

This cofferdam consisted of cribwork extending from the shore at both the east and west side of the enclosed space, and a double line of crib upon the southern frontage facing the flow of the stream. The cofferdam is said to have cost \$20,700, although the amount allowed in the specifications and contract for the entire unwatering necessary for the construction of the abutments of the ten piers going to the completed structure was only \$2,750.

When the spring freshets came, the water in the river rose 3 feet above the top of the dam, and thus entirely submerged the unwatered area. A glance-boom had been constructed and anchored to the upstream bank, possibly only for the protection

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of the concrete pier, which was still somewhat "green"—possibly with some idea that it would serve as a protection to the dam. If this was contemplated, it proved inadequate for the purpose.

The first logs to come down the stream were those owned by Mr. Gillies. These were 40,000 logs of ordinary timber. They passed down without causing any trouble. Mr. Booth's logs then came. They consisted of 16 booms, each containing about 50,000 pulpwood logs, 800,000 in all. The first of these logs passed by the dam; but, before long, logs lodged upon the piers of the railway bridge, and side-jams were formed. The jam on the north side extended upstream from the railway bridge, entirely covering the cofferdam by the time the third or fourth boom had been released, and soon extended beyond the cofferdam still further upstream to McNeil's Point. In the result, by the formation of this dam and the corresponding side-dam on the opposite side of the river, a narrow channel some 25 feet in width was left outside the cofferdam, and through this the remaining logs passed without difficulty or particular incident. The channel left between the cofferdam and the nearest pier to the south was some 200 feet. The narrowing of the stream by these side-jams was undoubtedly proper and advantageous from the standpoint of the lumbermen, as it enabled the remaining logs to be safely and expeditiously carried over the rapids and beyond the railway bridge; the water flowing in this confined space with extreme rapidity and with about 8 feet of depth.

After all the logs had passed, the river was "swept," and all the logs in the side-jams were allowed to pass downstream, those at the lower end being first dislodged. After the stream was clear it was found that the cofferdam was entirely useless. It was crushed, broken, and dislodged, so that for the purpose for which it was designed it was of no value. A new dam had to be constructed, tied in some parts to the old dam. This cost about \$8,000; but in the next spring freshet it was also carried away. The contractors then abandoned the undertaking and made the best terms they could with the Government. On the settlement with the Government they were allowed approximately \$10,000 for the dam in question. They now sue claim-

ing not only damages for the destruction of the dam, but damages by reason of their loss of profit owing to their inability to construct the concrete work to which this dam was ancillary.

There was some evidence, to which some credit should be given, that some part of the dam was carried away by the water before the logs came; but I am satisfied that most of the structure was in place when the logs came, and that its destruction must have been brought about by the defendant's logs.

The witness Bird cannot be relied upon, and I quite disregard his evidence.

The question in issue in the action turns, I think, entirely upon the true effect of the Rivers and Streams Act, which may conveniently be referred to in the revision, as there is no material change in the statute. By this Act, R.S.O. 1914, ch. 130, sec. 3, a right is given, subject to the provisions of the Act, during spring freshets to float and transmit timber down all rivers; and by sub-sec. 3 it is provided that, where necessary to remove any obstruction from the river to facilitate the transmission of timber, the obstruction may be removed, "doing no unnecessary damage to the river or to its banks." Section 4 provides that, where there is a convenient opening in any dam or other structure in or upon the bed of the river for the passage of timber, no person using the river for floating timber shall "injure or destroy such dam or other structure or do any unnecessary damage to it or to the banks of the river."

It is argued that this latter section applies to this case, and that there is no liability unless it can be shewn that what was here done can be described as "unnecessary damage" to the dam.

I have, with a good deal of reluctance, come to the conclusion that this contention is well-founded. The rivers of the Province are regarded as great highways for the transmission of timber, and the Province has seen fit to confer upon those engaged in lumbering extraordinary rights and privileges in connection with these rivers. The timber industry is one of vital importance to the Province, and, apparently as a matter of public policy, the paramount right is given to the lumber-

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man to take his timber down the streams, so long as he does not do unnecessary damage; which I interpret as meaning damage which could be avoided by the exercise of reasonable care and caution.

In this case the only evidence given by those competent to speak upon the subject is, that the course adopted by the defendant in taking this vast quantity of logs down the stream was the usual recognised and proper course from the standpoint of the practical lumberman. Where these great rights are given, there is sometimes a disposition to use them oppressively, and some statements in Mr. Gillies' evidence indicate to me that his standard of care of the rights of others is not that intended by the Legislature; but I am unable to find anything which would justify me in holding that there has been such disregard of the plaintiffs' right as to constitute what the Legislature meant by the expression "unnecessary damage."

In *Thompson v. Hill* (1870), L.R. 5 C.P. 564, a strong Court had to consider the provision of the Metropolitan Building Act which authorised the destruction of certain buildings "in a reasonable manner, and without causing unnecessary inconvenience." The building was pulled down, but no steps were taken to protect by a hoarding or otherwise the rooms of an adjoining owner, which were left exposed to the weather during the time the wall was being pulled down and rebuilt. It was argued that this occasioned unnecessary inconvenience, for by the erection of the suggested structures the inconvenience endured by the plaintiff would have been much reduced. It was held that there was no duty imposed by the statute to board up or take any active steps for the protection of the plaintiff's premises. The statute shewed, as Willes, J., says, the exact limit of the defendants' obligation. It did not include the doing of any independent act, such as the putting up of a hoarding.

This, I think, warrants me in holding that in this case all that the defendant was called upon to do was to refrain from doing that which may be described as an unnecessary negligent act, and that he was not called upon to erect any structure or to protect the plaintiffs' dam by glance-booms or similar devices.

No cases were cited as aiding in the interpretation of this unusual and in some ways extraordinary expression. It is easier to find definitions of the word "necessary" than the term "unnecessary." In the Century Dictionary, "necessary" is said to mean in law "requisite for reasonable convenience and facility or completeness in accomplishing the purpose intended."

In the great case of *McCulloch v. State of Maryland* (1819), 4 Wheat. 316, there is a discussion by Chief Justice Marshall of the meaning of the word "necessary." At p. 413 he says: "Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."

In other American cases there are statements more or less helpful: for example, in *Mobile and Girard R.R. Co. v. Alabama Midland R.W. Co.* (1888), 87 Ala. 501, a railway has a right to cross another road where necessary. It was held that this did not mean an absolute and unconditional necessity as determined by physical causes, but a reasonable necessity under the circumstances of the particular case, dependent upon the practicability of another route and its comparative cost.

In many cases one finds an expression such as this: "An act is unnecessary when done outside of the usual course of business pertaining to the subject:" *Purdy v. Lynch* (1895), 145 N.Y. 462, 473; *St. Louis and San Francisco R. Co. v. Franklin* (1909), 123 S.W.R. Repr. 1150.

In the English Courts similar expressions are to be found—e.g., in *In re Gasquoine*, [1894] 1 Ch. 470, the Court of Appeal say that an act is "not 'unnecessary' if it is done in the regular course of business."

All this goes to support Mr. Shepley's argument that dam-

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age cannot be said to be unnecessary when it is occasioned by what is done in the ordinary course of the business contemplated by the statute. I, however, prefer to base my decision not upon definitions found in dissimilar cases, but upon the broad principle that this statute intended to confer upon lumbermen the right to use streams for flotation of timber with immunity from damage for injuries done to the property of others unless it can be found affirmatively that the operations were conducted negligently and with reckless disregard of the rights of others; and, as I am unable in this case to find that negligence has been made out, the action fails.

*Action dismissed with costs.*

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### BROWN V. COLEMAN DEVELOPMENT CO.

*Statute of Frauds—Money advanced by Director of Company for Benefit of Company—Oral Promise of President of Company to Repay—Interest of President as Largest Shareholder—Evidence—Contract of Suretyship—Novation.*

The defendant G., the holder of the bulk of the shares of the defendant company, and its president, made advances to the company to enable it to meet its liabilities. The plaintiff, who was also a shareholder, a director, and the secretary of the company, also made advances for the same purpose; and it was established that he did so upon the oral promise of G. to repay the money so advanced:—

*Held*, upon the evidence, that the company was primarily the plaintiff's debtor; G.'s promise was a promise to answer for the debt of another—the company—and so the Statute of Frauds afforded a defence to the plaintiff's claim to recover from G.

G.'s contract was one of suretyship, notwithstanding his large interest; and the evidence did not justify the finding of a novation by which the original debtor was released.

Review of the authorities.

*Harburg India Rubber Comb Co. v. Martin*. [1902] 1 K.B. 778, and *Davys v. Busicell*, [1913] 2 K.B. 47, specially referred to.

APPEAL by the defendant Gillies from the report of Mr. J. A. C. Cameron, an Official Referee, dated the 27th April, 1915, finding the plaintiff entitled to recover from the appellant the sum of \$7,000, with interest from the 17th April, 1908; in the circumstances mentioned in the judgment.

June 24. The appeal was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*H. S. White*, for the appellant.

*H. E. Rose*, K.C., for the liquidator of the defendant company.

*W. M. Douglas*, K.C., and *S. W. McKeown*, for the plaintiff, respondent.

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June 25. MIDDLETON, J.:—The defendant Gillies at one time owned certain mining property in the township of Coleman. After the incorporation of the company, he sold this property to the company, in consideration of the allotment to him of the great bulk of the stock of the company. He was therefore vitally interested in the success of the corporate undertaking, but he had no other interest in it save that derived from his stockholding therein. Gillies was the president of the company; Brown was the secretary.

The company had no money with which to carry on its undertaking, and Gillies advanced to it, for the purpose of enabling it to meet its liabilities, a very considerable sum. Brown, in his capacity of engineer for the company, supervised the management of these operations, and was to receive the salary of \$10 per day from the company. He sent in accounts to the company for this salary from time to time, and stock of the company was issued to him at the price of 25 cents per share. Some of this stock he marketed, and it appeared that the price realised was much more than the 25 cents; so he also had an interest in the continuation of the company, although his interest was very much smaller than that of Gillies.

A time came when Gillies had apparently exhausted his ready money, and Brown commenced advancing money. His own account is as follows:—

“Q. 100. How did you come to make these advances? A. Mr. Gillies’ money had run short, and he did not want to discontinue the operation and have the company die out. He wanted to keep working, and he told me that if I would advance this money and keep the thing alive, that he had moneys coming in and he would return it to me.

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“Q. 101. When you say ‘advance this money’—what money?  
A. Money to the workmen to keep the operations of the company going. There were supplies and wages. . . .

“Q. 103. Well, did you agree to that? A. Yes, I agreed to it.

“Q. 111. Well, how is it that Mr. Gillies did not reimburse you from time to time for these advances? A Well, because he never got any money sufficient to reimburse him, and he had a good deal of money to pay out. This money I paid out did not represent anything like the money that was paid on those properties. He also paid out a lot of money. He paid out money when he had it, and I only paid out money when he did not have it.”

The amounts paid out by Mr. Brown in this way for the company reached a very large total. In the statement of claim particulars are given of sums amounting to \$9,274, in addition to a balance in respect of wages of \$3,300.

The defendant Gillies denies entirely the promise to repay. He claims that the advances made by Brown were made by him to the company, and that the motive for making the advances by Brown was to secure the continuance of this company, so that Brown could profitably market the shares which had been issued to him.

A portion of the evidence was taken before the late Mr. Kappele as Official Referee. The evidence of Gillies and of Brown, when recalled, was taken before Mr. Cameron, to whom the reference was transferred upon Mr. Kappele's death.

There are matters in the evidence of both the parties which are far from satisfactory, but I find myself unable to interfere with the finding of fact which has been arrived at by the Referee. It is not easy to explain the making of these large advances, in the absence of some promise by Gillies; and Gillies' own large advances and his very large stockholdings in the company, tell much against him when the probabilities of the case are considered.

The question of the effect of the Statute of Frauds requires careful consideration. The learned Referee has found that the advance was an advance to Gillies, and not to the company.

and that therefore the Statute of Frauds has no application. I cannot view the matter upon the evidence in this simple way. The plaintiff did not himself so regard the situation, for he rendered his accounts to the Coleman Development Company as debtors, and he included in this same account claims for advances and salary. It is admitted that the salary is a claim against the company, and the company alone.

When suit was brought, the plaintiff joined both the company and Gillies as defendants. He alleged employment by both defendants, and an agreement by both defendants with respect to the advances, and he claimed judgment against both for the full amount of his claim. The Referee has reduced the amount of the plaintiff's recovery to \$7,000, because on the 17th April, 1908, an agreement was entered into by which the plaintiff agreed to accept \$7,000, to be paid by the company before December, 1908, in consideration of which the plaintiff agreed to release "any claim he holds at present against the Coleman Development Company or J. F. Gillies in his personal capacity." The Referee regards this as limiting the amount of recovery to the sum named.

I have come to the conclusion that the Statute of Frauds affords a defence, and that the promise made by Gillies was in truth a promise to answer for the debt of the company. The real test, as I understand all the cases, is this: Is there a principal debtor liable? If there is, then the contract is one of suretyship. If there is not, then the contract is one of primary liability.

In some cases where the original transaction has been completed and there is an existing debt, the question comes to ascertaining whether there has been in truth a novation, so that the original debtor is released. In such cases the test stated in *Forth v. Stanton* (1869), 1 Wms. Saund. 220, 233, can readily be applied: Does the original party remain liable? Is there any liability on the part of the defendant or his property except such as arises from his express promise?

Where the liability of the primary debtor is not existing at the time of the defendant's promise, but arises, if at all, *in futuro*, the question is necessarily more difficult; and this is particularly

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the case where, as here, the parties are the managing directors of the company which is suggested as the primary debtor. It is undoubtedly of importance that the provisions of the Statute of Frauds should not be frittered away by judicial decisions, and that one director of a company should not be able to impose personal liability upon his co-director without the clearest and most satisfactory evidence. Here, I think, the true finding of fact upon the evidence ought to be that the company became debtor. This, I think, is a fair inference from the plaintiff's own evidence which I have quoted, from the mode in which the advances were made, and from the fact that in the accounts rendered and the action brought, the plaintiff treated the company as liable to him.

The law upon which I act is to be found in the leading case of *Birkmyr v. Darnell* (1704), 1 Salk. 27, annotated in Smith's Leading Cases, 11th ed., vol. 1, p. 299; *Lakeman v. Mountstephen* (1874), L.R. 7 H.L. 17, 24; *James v. Balfour* (1882), 7 A.R. 461.

Mr. Douglas relies upon *Sutton & Co. v. Grey*, [1894] 1 Q.B. 285. This is an extension of the exception which has been long regarded as established by what are sometimes called the *del credere* cases.

These, like the "property cases," do not come within the statute, because in each case the promise is not to answer for the debt to another, but is a promise by the debtor to answer for a liability of his own in connection with his own business.

The distinction and the true principle underlying these cases is well shewn by *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778—a case which is in some respects similar to that in hand. There a defendant, who had a large interest as shareholder in a debtor company which he had financed, orally promised execution creditors of the company to assume and pay the debt, and on the strength of this the execution was withdrawn and the company's assets sold. Mathew, J., held that this brought the case within the principle of *Sutton & Co. v. Grey*. It was held on appeal, reversing this decision, that the interest which the defendant had as a shareholder or other-

wise in freeing the goods of the company from execution did not take the case out of the statute.

The latest case dealing with the matter that I can find is *Davys v. Buswell*, [1913] 2 K.B. 47. There the oral promise by a person holding a floating charge on the assets of a company to answer a claim was held to be within the statute, notwithstanding the promisor's interest. The *dicta* in *Sutton & Co. v. Grey*, relied upon by Mr. Douglas, and some expressions in *Harburg India Rubber Comb Co. v. Martin*, are discussed. As put by Kennedy, L.J. (p. 58): "It seems to me illogical to say that, where you have a contract which according to the terms of the statute must be in writing, the application of the statute can be affected by the circumstance that one of the parties is induced to make the contract by the fact that he is interested in that which is the consideration for it;" or, as suggested by Joyce, J. (p. 59), "the more one considers the case, the clearer it becomes that this is a simple case of a promise to answer for the debt, default, or miscarriage of another, and that there is no other contract or arrangement to which that promise is incidental; and, therefore, there is nothing to exclude the operation of the statute."

Upon this ground the appeal must be allowed, with costs here and below, and unless there is to be a further appeal the action should be dismissed with costs as to this defendant.

The plaintiff should have the right to rank against the assets of the company now in the course of liquidation, for the amount found due to him by the report, subject to the right of the liquidator to claim against him with respect to any other matters which he may be advised to set up in the course of the liquidation. As between the plaintiff and the liquidator there should be no costs.

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June 28.

## LAVERE v. SMITH'S FALLS PUBLIC HOSPITAL.

*Negligence—Injury to Patient in Hospital—Carelessness of Attendants—Public Charitable Institution—Corporate Body—Contract with Patient—Liability—Care in Selection of Attendants—Master and Servant.*

The hospital conducted by the defendants, a corporate body, was a charitable institution, dependent for its maintenance upon grants from the Government of the Province of Ontario and from municipalities, and upon individual gifts and offerings; there was no share capital:—

*Held*, that damages resulting to patients from the negligence of employees may be recovered from corporate bodies in the position of the defendants. Liability depends upon the contract between the patient and the institutions, and upon the real relationship between the institution and the person whose negligence has caused the damage.

*Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, followed.

The plaintiff, a paying patient in the defendants' hospital, was injured by reason of the carelessness of some one in attendance upon her after an operation. There was nothing in writing to shew the nature of the contract between the parties:—

*Held*, that the contract, as shewn by the evidence, was that the defendants should in good faith use due care and skill in selecting the medical staff, and in employing and permitting nurses in training and other assistants to work for and attend to patients in the institution—and that was the extent of the defendants' duty and responsibility; that the relationship of master and servant did not exist between the defendants and the physicians, surgeons, nurses, and other attendants assisting at the operation, whether these were paid by the defendants or not; that the defendants were not guilty of any negligence in the selection of their staff and nurses and attendants; and, therefore, the plaintiff's action to recover damages for her injuries failed.

*Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, followed.

ACTION for damages for negligence causing injury to the plaintiff, who was operated upon in the defendants' hospital, and who, by reason of the carelessness of the doctors or nurses or some person or persons in attendance, was severely burnt by a hot brick or bricks in the bed to which she was removed after the operation and when she was unconscious. The defendants were a corporate body under the name of "The Smith's Falls Public Hospital."

The action was tried before BRITTON, J., without a jury, at Brockville.

J. A. Hutcheson, K.C., for the plaintiff.

G. H. Watson, K.C., and J. A. Hope, for the defendants.

June 28. **BRITTON, J.**:—The plaintiff, a married woman, who resided with her husband at Winchester, was suffering from an internal malady, and was advised by her physician to submit to a surgical operation. To this she consented, and she chose the defendants' hospital. She arranged with Dr. Ferguson and Dr. Gray, of Smith's Falls, for the operation and for their attendance upon her so long as might be necessary. The plaintiff and her husband were alone responsible for the payment of the medical men for the operation and such attendance upon her as might be necessary.

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The plaintiff applied to the defendants for admission, and it was agreed that she would be admitted to a room of her own selection, and that the charge would be \$9 a week for room and board, and she paid \$9, being one week in advance. Nothing was specially said about attendance; but a nurse in training had charge of the room which the plaintiff occupied, and the attendance reasonably necessary was implied in the arrangement made. The customary attendance was—and it was so in this case—that a nurse in training should have charge of certain rooms; and to one was assigned the room of the plaintiff.

The plaintiff entered the hospital on Saturday the 1st February, 1913, and the operation was successfully performed on the morning of Monday the 3rd. To Miss Thomas, a nurse in training, was assigned the care of the plaintiff and the room she was to occupy. For the purpose of the operation the patient was put under the influence of an anæsthetic.

Immediately after the operation and when the plaintiff was unconscious, she was taken upon a stretcher by Dr. Ferguson, assisted by two nurses, to her room, and placed in bed. The bed-clothes were rolled or folded longitudinally, so as not to interfere with easily placing the patient, and covering her when placed, upon the bed. The two nurses—Miss Thomas and Miss McAmmond—saw two or three bricks wrapped in brown paper upon the bed. Each of these two denied placing these bricks there.

The plaintiff's sister, Mary Dixon, was one somewhat accustomed to and skilled in nursing. She was not a graduate, nor had she the training necessary to be called a trained nurse, and

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she did not pretend to be such; but she had knowledge and skill, and her services were sought after and rendered for pay; so that nursing must be considered her occupation.

The plaintiff desired her sister to be with her in the hospital during and after the operation. The sister consented, but she took no part in the care of the plaintiff. She would not assume any responsibility, and did none of the work. She was there as company for the plaintiff, and, by agreement with Miss Austin, the lady superintendent, she was to pay \$3 a week for her room and board.

Two or three heated bricks were brought from the oven and placed upon the bed for the purpose of warming it; a necessary and usual thing to do in putting a patient to bed after an operation. At least one of these bricks was placed in contact with the right foot of the plaintiff, and allowed to remain there until consciousness returned to her. The plaintiff was very badly injured.

The evidence as to the actual placing of the brick at the feet of the plaintiff is not satisfactory. It may be that any one of those present might, with the best of intentions, have done so. From the evidence the reasonable and fair inference would be that one of the heated bricks, or more than one, was or were placed at the foot of the plaintiff, and that may have been done in the presence of the doctor who was in the room when bricks were seen upon the bed.

The defendants' hospital is a charitable institution, dependent for its maintenance upon grants from the Government of the Province of Ontario and from municipalities, and upon individual gifts and offerings. There is no share capital. For a long time it was held that the money so received by charitable institutions could not be used or paid out for damages resulting from negligence of employees. That is not the case now. Such an institution may be held liable, and may have to pay. See *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93. Liability now depends upon the contract between the patient and the institution, and upon the real relationship between the person whose personal negligence caused the damage and the institution as the employer of such person.

The contract in this case was not that the defendants would nurse the patient, but that the defendants would give to the patient reasonable care and attention, under the directions of her medical adviser, and comforts and conveniences, including food, etc., under the directions of the hospital authorities.

The hospital had not at the time of this accident any written or printed rules, but the practice had been as in this case.

The present case, as to contract and liability, comes under the rule laid down in the following and other cases:—

*Hall v. Lees*, [1904] 2 K.B. 602. “The defendants were an association whose object was to provide for the supply of duly qualified nurses to attend on the sick in a certain neighbourhood. The association for that purpose appointed and paid salaries to nurses, for whose services they made charges to persons on whose application the nurses were supplied. The association issued printed rules and regulations with regard to the duties of their nurses and other matters with a view as well to the protection of the nurses as to ensuring their efficiency while engaged in nursing. These regulations provided for the exercise of certain supervision over the nurses by a superintendent appointed by the association; but, with regard to the work of a nurse while engaged in nursing a patient, it was provided (*inter alia*) that, while so engaged, she should not absent herself from duty without the permission of the patient’s friends, and that she should implicitly follow the instructions of the patient’s medical man. A form, which was sent out by the association upon supplying nurses, indicated to the person applying for the nurse that, while engaged in nursing the patient, the nurse was to be regarded as employed by that person. Two nurses were supplied by the association for the purpose of nursing the female plaintiff through an operation which was to be performed upon her by a medical man in attendance upon her. An injury was occasioned to the female plaintiff through the negligence of the nurses, or one of them, while engaged in nursing her: *Held*, that, upon the true construction of the documents in relation to the supply of the nurses, the contract of the association was, not to nurse the female through the agency of the nurses as their servant, but merely to procure for her duly qualified nurses, and that the

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nurses were not, in nursing the female plaintiff, acting as the servants of the association; and therefore the defendants were not liable in respect of negligence of the nurses supplied by them."

*Evans v. Mayor, etc., of Liverpool*, [1906] 1 K.B. 160. "The defendants, a local authority, acting under the provisions of the Public Health Act, 1875, provided for the use of the inhabitants of their district a hospital for the reception of persons suffering from infectious diseases. A visiting physician, who was a competent medical practitioner, was appointed to the hospital, and acted under the general direction of the hospitals committee of the defendants, the rules providing (*inter alia*) that he should be responsible for 'the treatment of the patients from the beginning to the end of their stay, and also for their freedom from infection when discharged.' A son of the plaintiff was treated in the hospital while suffering from a mild attack of scarlet fever, and was ultimately discharged by the visiting physician while still in an infectious condition, and under circumstances which a jury found to amount to a want of reasonable skill and care on his part in and about the discharge; after the boy had returned home, he communicated the disease to three other children of the plaintiff. The plaintiff then sued the defendants to recover the expense to which he had been put in regard to the illness of his other children owing to the premature discharge of his son from the hospital by the visiting physician: *Held*, that the plaintiff was not entitled to recover, for the legal obligation of the defendants extended only to the provision of reasonably skilled and competent medical attendance for the patients, which they had discharged, and that there was no absolute undertaking or obligation on their part that no patient should be discharged by the visiting physician while still in a condition which might cause infection."

*Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820. "The only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff. The relationship of master and servant does not exist between the governors and the physicians and surgeons who give their services at the hospital, and the nurses and other attendants assist-

ing at an operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that period from the operating surgeon alone and not from the hospital authorities. The plaintiff brought an action against the governors of a hospital for damages for injuries alleged to have been caused to him during an operation by the negligence of some member of the hospital staff: *Held*, that the action was not maintainable."

These cases were relied upon by the plaintiff, and of these *Hall v. Lees* is perhaps the strongest. In that case the contract was interpreted by the true construction of the documents.

Here there were no documents, and the contract must be interpreted by the evidence of what took place between the plaintiff and defendants, having regard to the relation between the defendants and the attendants resident in the hospital whose services the plaintiff would require and get.

I find that the contract in the present case was, and that the only duty to the patient was, that the president and directors should in good faith use due care and skill in selecting the medical staff, and in employing and in permitting nurses in training and other assistants to work for and attend to patients in the institution.

I am of opinion that, as decided in the case of *Hillyer v. Governors of St. Bartholomew's Hospital*, the relationship of master and servant does not exist between the directors and the physicians and nurses and other attendants assisting at an operation. This is so whether the attending physicians and nurses are paid by the hospital or not.

This hospital seems to have been generally well managed. The directors are not guilty of any negligence in selecting any of the official staff or in the selection of attendants or nurses in training.

These nurses are paid a small sum to cover their incidental expenses, and they get their board. They are carefully selected, having regard to their competency for the duties assigned to them.

Interpreting the rule as to liability applicable in the present case, I am of opinion that the action should be dismissed, but without costs.

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[IN CHAMBERS.]

June 28.

## RE LAW.

*Executors and Administrators—Foreign General Administratrix—Administration of Assets in Ontario by Ontario Administrators—Disposition of Balance—Interest of Infant—Payment to Foreign Administratrix—Payment into Court—Trustee Act, R.S.O. 1914, ch. 121, sec. 38(2).*

A person resident in a foreign country died there, intestate, and letters of administration of his whole estate, were issued to his widow by a Probate Court having jurisdiction in his place of abode. A part of his estate consisted of personalty in Ontario, and letters of administration in reference to that part were issued to a trust company by a Surrogate Court in Ontario. The trust company administered the Ontario assets, and had a balance in their hands after payment of expenses, etc. This was claimed by the widow as general administratrix. One of the persons beneficially entitled to a share of the estate was an infant; and the Official Guardian, intervening on her behalf, contended that the moneys realised in Ontario, or a portion of them, should be paid into Court:—  
*Held*, that the whole of the money should be paid to the foreign administratrix.

The passing of the accounts of the Ontario administrators was not the "passing of the final accounts," within the meaning of sec. 38(2) of the Trustee Act, R.S.O. 1914, ch. 121—it was in fact only a collection by the Ontario administrators for the home administratrix, to enable her to pass the accounts and make final distribution.

APPLICATION by the Canada Trust Company, the Ontario administrators of the estate and effects of Thomas Parker Law, who died intestate in Chicago, in the State of Illinois, where he was resident at the time of his death, for leave to pay into Court the balance of the amount realised by them from the assets in Ontario of the deceased, after payment of all claims and expenses, and for payment out thereof to Catherine Irene Law, the widow of the deceased, who had been duly appointed by the Probate Court at Chicago the administratrix of the whole of his estate, or for leave to pay directly to her.

The persons beneficially entitled to the estate, after payment of debts and liabilities, were the widow herself and three children, one of them an infant.

June 26. The application was heard by BRITTON, J., in Chambers at London.

*F. P. Betts*, K.C., for the applicants. It is incumbent on the foreign administrator (*i.e.*, in this case, the Ontario administrators) to take the necessary steps in due course of administration to ascertain the creditors and persons having claims upon the

estate in the foreign country, and upon ascertainment to pay their claims. That having been done, the proper course for the foreign administrator is to remit the surplus moneys in his hands to the home administrator (i.e., in this case, the Illinois administratrix): *Eames v. Hacon* (1880-81), 16 Ch. D. 407, 18 Ch. D. 347; *Williams on Executors*, 10th ed., pp. 341, note (b), 1285 *et seq.*; *Re Donnelly* (1911), 2 O.W.N. 1388, 19 O.W.R. 708.

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*F. W. Harcourt*, K.C., Official Guardian, representing the infant, contended that, under the Trustee Act, R.S.O. 1914, ch. 121, sec. 38(2), on the "passing of the final accounts," these particular funds, or a portion of them, should be paid into Court in Ontario to await the majority of the infant.

June 28. *BRITTON, J.*:—T. P. Law in his lifetime was resident at Chicago, and died there intestate, leaving an estate of about \$20,000. Letters of administration were granted by the Probate Court of Cook County, State of Illinois, to his widow, Catherine Irene Law. These were general letters, having reference to the whole estate, distribution of which will be made by the administratrix in the home domicile of the deceased.

A part of the estate—a comparatively small part—consisted of personalty in the city of London, Province of Ontario, and in reference to this letters of administration were granted by the Surrogate Court of the County of Middlesex to the Canada Trust Company.

The assets in the Province of Ontario have been got in, converted into money, and out of it all costs in Ontario have been paid, and there is a net balance in hand of \$744.76. This sum the home administratrix demands, for the purpose of making final distribution and winding up the estate. The present application is for leave to pay this money into Court and then pay it out to the administratrix, Catherine Irene Law, or to dispense with payment into Court and for leave to pay the money directly to her.

The persons entitled to the estate, after payment of all just debts and liabilities, are, the widow, one son, and two daughters under the age of twenty-one, but one of the daughters, viz., Lillian K. Law, was born on the 9th March, 1897, and is over the age of eighteen years.

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The motion is made upon notice to the Official Guardian. The Official Guardian calls attention to R.S.O. 1914, ch. 121, sec. 38 (2). This is as follows: "Where, on the passing of the final accounts of a personal representative, guardian or trustee by the Judge of a Surrogate Court, there is found to be in the hands of such personal representative, guardian or trustee any money belonging to an infant, or to a lunatic or person of unsound mind, or to a person whose address is unknown, it shall be the duty of such personal representative, guardian or trustee to pay the money into the Supreme Court to the credit of the person who is entitled to it."

This is not the final passing of the accounts. It is in fact only a collection by the Ontario administrators for the home administratrix, to enable the latter to pass the accounts and make final distribution.

Every material fact is established by the applicants, and proof and papers having reference thereto have been filed on this application, and it appears that the administratrix has given satisfactory security for all moneys which may come to her hands belonging to the estate.

The order will be made, giving leave to pay this money direct to the administratrix, Catherine Irene Law, of the city of Chicago, State of Illinois, administratrix. From the amount will be deducted the costs of the Official Guardian, which I fix at \$5. The balance may be paid over.

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REX V. BATTERMAN.

June 29.

*Criminal Law—Rape—Conviction—Application by Accused for Stated Case—Refusal by Trial Judge—Absence of Doubt—Evidence—Letter—Instructions to Jury.*

Upon the trial of a person for an offence against the criminal law, the trial Judge should not state a case for the opinion of a court of appeal unless he has some doubt in the matter upon which it is suggested that a question be reserved.

At the trial of the defendant upon a charge of rape, there was evidence that, after the offence, the prosecutrix and her husband consulted a solicitor, who gave them a letter, addressed to one of them, and enclosed in an unsealed envelope addressed to the defendant; that the letter was shewn to the defendant, and returned to the solicitor; but it was not produced at the trial, nor was evidence of its contents given. While the jury were deliberating, the Judge received from the foreman a note asking to see the letter. The Judge instructed the Registrar to inform the foreman that the letter was not available; and the Registrar went to the jury-room for that purpose. The jury found the defendant "guilty;" and counsel for the defendant asked the Judge to state a case raising questions as to whether he was right: (1) in giving instructions to the jury in the way he did; (2) in directing the jury that the letter was not evidence without pointing out that the writing and delivery of it and the manner in which it was addressed were proved; and (3) in not compelling the Crown to produce the letter or give evidence of its contents:—

*Held*, that the application should be refused.

*Wilmont's Case* (1914), 10 Cr. App. R. 173, distinguished.

APPLICATION by the defendant for a stated case.

The application was heard by KELLY, J., the trial Judge, after the trial and conviction of the defendant at the assizes at Owen Sound in October, 1914.

*E. E. A. DuVernet*, K.C., and *D. C. Ross*, for the applicant.

*J. R. Cartwright*, K.C., for the Crown.

June 29. KELLY, J.:—This is an application by the defendant for a stated case to determine questions in the notice of motion and hereinafter set forth.

On the 8th October, 1914, at the jury sittings at Owen Sound, at which I presided, the defendant was found guilty on a charge of rape on the wife of a neighbouring farmer. On the 15th April, 1914, two days after the commission of the offence, the woman and her husband went to Chesley, some miles distant from her home, and consulted a solicitor about the matter, and the evidence is, that the solicitor gave them a

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letter, addressed to one or other of them, and enclosed in an unsealed envelope addressed to the defendant, with the object of its being shewn to him. Two days afterwards, when the defendant came to the residence of these people, and when, it is alleged by them, he again made improper advances towards the wife, the letter was handed him for perusal, after which it was given to the husband, who soon afterwards returned it to the solicitor. It was not produced at the trial, nor was evidence given of its contents. In the charge to the jury their attention was directed to all this.

While the jury were deliberating, the foreman sent to me—I was then presiding at the hearing of another case—by the Registrar of the Court, a note to the effect that the jury wished to see the letter referred to. I instructed the Registrar to return and inform the foreman that the letter itself was not put in possession of the Court, and it was not possible for me to give it to the jury. He then went to the jury-room for that purpose.

The application is that I should now state the following for the opinion of the Appellate Division:—

(1) Was I right “in giving instructions or directions to the jury in the manner and by the means aforesaid?”

(2) Was I right “in directing the jury that the letter in question was not evidence without pointing out that the fact as to the writing and delivery of the letter was proved, and also the facts as to how the letter and the envelope were addressed?”

(3) Should I have “compelled the Crown to produce the original letter, it having been proven that it was last in possession of the husband of the prosecutrix; or, on proof of its loss, should I have allowed secondary evidence of its contents to be given in evidence?”

My distinct recollection is, and it is borne out by a reference to the charge to the jury, a transcription of which is now before me, that in the charge, as mentioned above, I expressly drew the attention of the jury to the evidence of the writing of the letter and its delivery to the defendant, as well as the manner in which it and the envelope in which it was enclosed were addressed.

The letter was returned to the solicitor before proceedings

were instituted against the defendant; it was not, as stated in the notice of motion, last in the possession of the husband of the prosecutrix. I refer especially to this because on the argument of the present motion counsel for the prisoner urged that when the jury asked for the letter it should have been pointed out to them that, though its contents were not in evidence, the fact that a letter had been written and shewn to the prisoner should have been stated to them, lest they might be under the impression that the evidence of its very existence was excluded.

More than once it has been held in Canadian Courts that a reserved case should not be granted by the trial Judge unless he has some doubt in the matter upon which it is suggested that a question be reserved for the opinion of a court of appeal: *Regina v. Létang* (1899), 2 Can. Crim. Cas. 505; *Rex v. Brindamour* (1906), 11 Can. Crim. Cas. 315. If that is the correct rule to be followed, then, with the knowledge I have of the present case, I have no doubt about the propriety of refusing the application.

*Willmont's Case* (1914), 10 Cr. App. R. 173, is cited as authority in support of the application. The head-note to that report is: "No communication whatever may be made to a jury deliberating on its verdict, except on the request or by the permission of the Judge." From a perusal of the reasons for that judgment it is apparent that the facts are quite distinguishable from those now under consideration.

I see no ground for any other course than to dismiss the application.

Costs of the motion should follow the result.

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[MIDDLETON, J.]

June 29.

## RE LUTHERAN CHURCH OF HAMILTON.

*Church—Conveyance of Land to Trustees for—Appointment of New Trustees—Power to Mortgage—Resolution of Congregation—Religious Institutions Act, R.S.O. 1914, ch. 286, secs. 7, 8, 16, 18—Trustee Act, R.S.O. 1914, ch. 121.*

In 1909, land was conveyed to six persons named and described as the trustees of a certain church; they took the land as joint tenants, and not as tenants in common; but the conveyance did not define the trust nor make any provision for the appointment of new trustees. There was no formal appointment of the trustees as such by the congregation of the church. Two of the trustees resigned. In 1915, the congregation, at a special meeting, passed a resolution approving and confirming the appointment of the six original trustees, and providing a mode of appointing successors to trustees in the future:—

*Held*, having regard to the provisions of the Religious Institutions Act, R.S.O. 1914, ch. 286, especially secs. 7, 8, 16, and 18, that, all technical requirements of the Act as to notices of meetings etc. having been complied with, the congregation had ample power to appoint trustees and to determine the manner in which their successors should be appointed; and that, upon this being done, the land, without conveyance, vested in the trustees so appointed, and they had power to mortgage the land for the purposes mentioned in sec. 8.

The Religious Institutions Act governs the appointment of trustees for religious institutions, and this by implication excludes the corresponding provisions of the general Trustee Act, R.S.O. 1914, ch. 121.

MOTION by the trustees of the Trinity Evangelical English Lutheran Church of Hamilton for an order declaring that they had been duly appointed trustees, and that, under the Religious Institutions Act, R.S.O. 1914, ch. 286, they had authority to mortgage lands held in trust for the church; or for an order, under the Trustee Act, appointing the applicants trustees and vesting the property in them.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*Kirwan Martin*, for the applicants.

June 29. MIDDLETON, J.:—The question arising upon this motion is the position of certain property held in trust for the Trinity Evangelical English Lutheran Church of Hamilton.

On the 31st December, 1909, the property in question was conveyed to six trustees, describing them as “the trustees of the Trinity Evangelical English Lutheran Church of Hamil-

ton." The trustees took the property as joint tenants, and not as tenants in common; but the conveyance does not define the trust nor make any provision for the appointment of new trustees. The church authorities are now erecting a new edifice, and desire to raise money upon the strength of a mortgage on the lands in question. The trustees were chosen because they held office as deacons in the church, but there was no formal appointment of them as trustees. Four of the trustees are still deacons of the church. One of the trustees resigned his office, and apparently thought this was sufficient to divest him of the trust. Another trustee also resigned as deacon, and now has formally resigned his office as trustee.

At the annual meeting of the congregation on the 16th June instant, a by-law was passed providing that the deacons shall not be regarded as trustees; and at a special meeting of the congregation, held on the 22nd June, 1915, after due notice, a resolution was passed approving and confirming the appointment of the six original trustees and confirming the appointment of two new trustees, and providing a mode of appointing successors to trustees hereafter. The object of this application is to declare that these trustees have been duly appointed, and that, under the Religious Institutions Act, they have authority to mortgage the church lands

The statute, R.S.O. 1914, ch. 286, appears to be intended to enable difficulties such as those now arising to be satisfactorily solved without the aid of special legislation. Although the property might have been conveyed to the trustees under a collective name, the fact that the parties named took as trustees for the church sufficiently appears from the evidence and the deed. Section 7 gives to the congregation the power to fix the number of trustees to constitute the trustee board where the trust deed is silent; and by sec. 16 (1) the congregation may, where land is held without the matter of appointing successors being set forth in the conveyance, determine in what manner the successors shall be appointed; and where the congregation is entitled to any land the congregation may also appoint trustees for the congregation and determine in what manner their successors in the trust shall be appointed.

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By sub-sec. 2 any land to which a congregation is entitled shall vest in and be held by the trustees to be appointed as mentioned in sub-sec. 1, and their successors in the trust, immediately upon the registration of the proceedings, without any conveyance or instrument.

By sec. 18 provision is made for the recording of the proceedings of the congregation and the deposit of a copy in the registry office.

Power to mortgage is conferred by sec. 8, where a debt is contracted for building or repairing a church or other church building, or for the purchase of land for church purposes.

It seems to me that the statute is simple and effective, and that, all technical requirements of the Act as to notices of meeting and so forth having been complied with, the congregation had ample power to appoint trustees and to determine the manner in which their successors should be appointed, and that, upon this being done, the property, without conveyance, vested in the trustees so appointed.

Mr. Martin asked that I should make an order under the Trustee Act, R.S.O. 1914, ch. 121, appointing these trustees and vesting the property in them; but I do not think that I should do so; for it appears to me that the intention of the Legislature was that ch. 286 should govern and control the appointment of trustees for religious institutions, and this by implication excludes the corresponding provisions of the general Trustee Act. I should be loath to create a precedent which would throw any doubt upon the many titles held upon the theory on which I am acting.

It is quite true, as pointed out by Mr. Martin, that sec. 16 (1) has by amendment from its original form been made wider, and covers cases not originally contemplated; but I cannot follow his reasoning when he seeks to narrow the application of sub-sec. 2 so as to confine it solely to the cases governed by the original sub-sec. 1. The statute being to my mind quite plain, I prefer to follow its apparent meaning rather than seek to give it some occult signification derived from an historical scrutiny as to its origin. Nor do I see any good purpose which would be

served by reviewing the earlier cases in which difficulties have from time to time been pointed out, merely for the purpose of shewing that the legislation in its present form is a deliberate attempt on the part of the Legislature to get over these difficulties.

The order may therefore declare that the property is now vested in the six present trustees, and that they have power to mortgage the same, conferred upon them by sec. 8 of the Religious Institutions Act.

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RE ARTHUR AND TOWN OF MEAFORD.

June 29.

*Municipal Corporations—Local Option By-law—Motion to Quash—Similar By-law Submitted to Electors in Previous Year and not Approved—Liquor License Act, R.S.O. 1914, ch. 215, sec. 137(6)—Consent Judgment Declaring Submission a Nullity—Diversity of Judicial Opinion—Motion Referred to a Divisional Court—Judicature Act, R.S.O. 1914, ch. 56, sec. 32—Irregularity in Service of Notice of Motion—Failure to File Affidavits before Service—Rule 298—Municipal Act, R.S.O. 1914, ch. 192, sec. 286—Solicitor's Slip—Relief against—Rule 184.*

In 1913, a local option by-law was submitted to the electorate of a town; the vote in favour of it was not sufficient to permit of its being passed. An action was then brought (*Overholt v. Town of Meaford*) and a consent judgment pronounced declaring that the submission of that by-law was a nullity, and permitting a by-law to be submitted to the electorate in 1914, notwithstanding the provision of the Liquor License Act (R.S.O. 1914, ch. 215, sec. 137(6)) prohibiting a submission of a similar by-law within three years—upon the theory that there were such irregularities in the submission that, if the by-law had been passed, it would have been quashed. An action brought to restrain the town corporation from submitting a by-law in 1914 was unsuccessful: *Hair v. Town of Meaford* (1914), 31 O.L.R. 124; a by-law was submitted, approved by the electors, and passed by the council on the 16th February, 1914.

A motion to quash that by-law, because of the submission of the previous by-law within three years, was referred to a Divisional Court of the Appellate Division. The Judge who heard the motion being of opinion that the decision in *Overholt v. Town of Meaford* was wrong and of sufficient importance to be considered in a higher Court: Judicature Act, R.S.O. 1914, ch. 56, sec. 32.

The notice of motion to quash the by-law of the 16th February, 1914, was served on the 13th February, 1915; the affidavits in support of it were not filed before the service of the notice of motion, as required by Rule 298, but were filed on the 20th February, when the motion was set down for hearing. Copies of the affidavits were demanded, affidavits in answer were filed, and cross-examination upon the affidavits took place. It was contended that the motion should be dismissed, because the affidavits were not filed in time, and because the application was not made within one year after the passing of the by-law (sec. 286 of the Municipal Act, R.S.O. 1914, ch. 192), for, although the application is "made" when the notice of motion is "served," it must be validly and regularly served:—

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*Held*, that the Court had power to relieve against the slip of a solicitor or his clerk, and the irregularity should be ignored: Rule 184.  
*Devlin v. Devlin* (1871), 3 Ch. Chrs. 491, and *Re Backhouse v. Bright* (1889), 13 P.R. 117, followed.

MOTION by W. H. Arthur for an order quashing a local option by-law passed by the Municipal Council of the Town of Meaford on the 16th February, 1914.

June 28. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

W. A. J. Bell, K.C., for the applicant.

W. E. Raney, K.C., for the town corporation.

June 29. MIDDLETON, J.:—The main attack upon the by-law arises from the fact that a similar by-law had been submitted to the electorate in 1913, and failed to obtain the necessary number of votes to permit of its being passed.

After the by-law of 1913 had been defeated, an action of *Overholt v. Town of Meaford* was brought, and in that action a consent judgment was pronounced declaring the nullity of the submission in 1913, and permitting a by-law to be submitted to the electorate in 1914, notwithstanding the provision of the Liquor License Act which prohibits a submission of a similar by-law within three years.\* The theory upon which this judgment was pronounced was that there were such irregularities in the submission that, if the by-law had been passed, it would have been quashed.

At the time the by-law now in question was submitted, an action of *Hair v. Town of Meaford* was brought to restrain a submission. This failed at the trial, and the Appellate Division refused to interfere, leaving the parties to their remedy upon a motion to quash: *Hair v. Town of Meaford* (1914), 31 O.L.R. 124.

In view of the diversity of judicial opinion, it appears to me that this is a proper case in which to adopt the course pointed out by sec. 32 of the Judicature Act, R.S.O. 1914, ch. 56. It is not competent for me to disregard the decision of the learned Judge who dealt with the action of *Overholt v. Town of Meaford*, for he

\*See sec. 137 (6) of the Liquor License Act, R.S.O. 1914, ch. 215.

must have thought that he had jurisdiction to pronounce the judgment he did; but, for the reasons shortly stated in what I said in *Hair v. Town of Meaford* (1914), 5 O.W.N. 783, upon a motion for an interim injunction, I deem the decision wrong and of sufficient importance to be considered in a higher Court; I therefore refer the case now before me to a Divisional Court.

Mr. Raney objected to my adopting this course, arguing that this motion ought to be dismissed, not only in the view that he entertained of the law, but because the motion, as he says, was not made within the time limited by the Municipal Act. The by-law was passed on the 16th February, 1914; the affidavits were made in due time; and the notice of motion was served on the 13th February, 1915. By somebody's bungle, the affidavits were not filed until the motion was set down on the 20th February, 1915.

Mr. Raney puts his objection in two ways. First, he says, the motion must be dismissed because the affidavits were not filed in due time. Rule 298 provides that the affidavits shall be filed before the service of the notice of motion. Secondly, he says that, although it has for long been held that an "application is made within one year after the passing of the by-law" (sec. 286 of the Municipal Act, R.S.O. 1914, ch. 192), when the notice of motion is served within a year, this is predicated upon a notice of motion validly and regularly served.

In this case copies of the affidavits have been demanded, affidavits in answer have been put in, cross-examination has taken place, and the motion appears to be full-grown, although, if Mr. Raney's contention is well-founded, it might well have been strangled in infancy; and it appears to me that this is one of the cases in which I may adopt what was said in *Devlin v. Devlin* (1871), 3 Ch. Chrs. 491: "The Court has power to relax its general, as well as its special orders, to relieve from undertakings, and to extricate clients from difficulties occasioned by their solicitor." Objections of this kind are almost obsolete; for the principle initiated by Rose, J., in *Re Backhouse v. Bright* (1889), 13 P.R. 117, "to build up a client's case on the slips of an opponent, is not the duty of a professional man," seems to be generally recognised. The same sentiment is found in *Graham v. Sutton Carden & Co.*, [1897] 1 Ch. 761, where Rigby, L.J., says (p. 766):

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"Solicitors do not do their duty to their clients by insisting upon the strict letter of their rights. That is the sort of thing which, if permitted, brings the administration of justice into odium. It is our duty to prevent such consequences if we can."

Armour, C.J., in *Bank of Hamilton v. Baine* (1888), 12 P.R. 439, 442, in the early days of the Judicature Act, says: "Having regard to modern ideas and modern legislation in matters of practice and procedure, such rules must now be applied only in the interest of and for the advancement of justice, and not in support of ancient technicality."

But long before this, Lord Eldon had said (*Princess of Wales v. Earl of Liverpool* (1818), 1 Swanst. 114, 125): "There is no general rule with respect to the practice of this Court that will not yield to the demands of justice."

I feel that I should sin against light and reason if I should hold that the Court had no power to relieve against this unfortunate slip, and that I was bound to cast upon the litigant a great burden of costs and deny him a hearing on the merits because a law-student forgot to file the papers the day when they were given him for that purpose.

The Rule which applies in this case is not that relating to the extension of time, but Rule 184.\* There was an irregularity, but the proceedings are not void, and I think the duty imposed upon me to deal with them as may be deemed just requires that this irregularity should be ignored.

\*184. Non-compliance with the Rules shall not render the writ or any Act or proceeding void, but the same may be set aside, either wholly or in part as irregular, or may be amended, or otherwise dealt with, as may seem just.

[IN CHAMBERS.]

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## RE STANDARD LIFE ASSURANCE CO. AND KEEFER.

June 30.

*Life Insurance—Policies Declared to be for Benefit of Wife and Children—Rights of Children of Deceased Children—Retrospective Legislation—Insurance Act, R.S.O. 1914, ch. 183, secs. 170, 171 (9), 178 (1) (7).*

The provisions of the Insurance Act, R.S.O. 1914, ch. 183, were *held* applicable to policies of life insurance effected in 1850 and 1851, the insured dying in 1915: sec. 170.

Section 171 makes provision for the case of beneficiaries other than preferred beneficiaries; and sec. 178 deals with the rights of preferred beneficiaries—a class defined in sub-sec. 1, and including grandchildren. Notwithstanding that the policies had been declared by the insured to be for the benefit of his wife and children, under sec. 178(7) the children of deceased children were *held* entitled to share, and not merely the survivor of the original class, who would be alone entitled under sec. 171 (9).

Remarkd, that, if the insured had died in 1912, the grandchildren would have taken nothing; the provisions of sec. 178(7)—retrospective legislation of the most drastic kind—having been first enacted in that year.

MOTION by Charles H. Keefer for payment out of Court to him of certain insurance moneys paid in by the company, in the circumstances stated in the judgment.

June 29. The motion was heard by MIDDLETON, J., in Chambers.

*H. M. Mowat*, K.C., for the applicant.

*J. R. Meredith*, for the Official Guardian, representing Annie E. Fleming and T. K. Fleming, infant grandchildren of the deceased insured.

Edward C. Keefer and Miss A. E. M. Keefer, adult grandchildren of the insured, were not represented, though notified.

June 30. MIDDLETON, J.:—The late Thomas C. Keefer, who died on the 7th January, 1915, effected an insurance upon his life for £1,000 sterling in 1850, and a second policy of the like amount in 1851. The Act enabling policies to be declared to be for the benefit of the wife and children of the insured was passed in 1865.\* In 1866, and within the period of one year limited by that Act, Mr. Keefer declared each of the policies to be for the benefit of his wife and children, without naming them.

\*An Act to secure to Wives and Children the benefit of Assurances on the lives of their Husbands and Parents, 29 Vict. ch. 17.

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Mr. Keefer was twice married; his first wife died in 1870, his second wife in 1906.. He left him surviving only one son, the applicant, Charles H. Keefer, and four grandchildren, the infants, children of his youngest daughter, who died in 1903, and Mr. E. C. Keefer and Miss A. E. M. Keefer, children of Ralph Keefer, a son who died in 1884.

The insurance company paid to Mr. C. H. Keefer one-third of the insurance money; and as to this there can be no question about his title. The other two-thirds were paid into Court, it being suggested that under the Insurance Act as it now stands the children of deceased children are entitled to take the shares their parents would have received had they survived.

If the Insurance Act as it is now found is alone to be looked at, I do not think that there can be any question as to the right of the grandchildren. By sec. 170, the Act, R.S.O. 1914, ch. 183, is made to "apply to all contracts of insurance of the person and declarations whether made before or after the passing of this Act." As I read the Act, sec. 171 makes provision for the case of beneficiaries other than preferred beneficiaries, and sec. 178 deals with the rights of preferred beneficiaries.\* The provisions are by no means identical; and unless this is kept in mind the Act cannot be understood.

Section 171(9), upon which Mr. Mowat relies, undoubtedly provides that where there is more than one beneficiary, and some beneficiaries predecease the insured, the surviving beneficiaries take; but a totally different provision is found in the section relating to preferred beneficiaries. By that section, 178(7), in the events that have here happened, the grandchildren take, because it is provided that if the beneficiary predeceasing the insured "is a child of the assured, and leaves a child or children surviving him," his share "shall be for the benefit of his child or children, in equal shares."

The one point of difficulty, as the matter presents itself to me, is the singular situation arising from the fact that the provi-

\*By sub-sec. 1 of sec. 178, "preferred beneficiaries shall constitute a class and shall include the husband, wife, children, grandchildren and mother of the assured, and the provisions of this and the following three sections shall apply to contracts of insurance for the benefit of preferred beneficiaries."

sion which I have quoted was first enacted in the revision of the statute in 1912 (2 Geo. V. ch. 33, sec. 178(7)); so that, if the insured had died in 1912, the grandchildren would have taken nothing. The trust created by the statute and the declaration had become a trust for the benefit of the sole surviving child, and the operation of the statute is certainly most drastic when it has the effect of admitting others to take the place of those deceased members of the original class who had then, by reason of death, no further interest.

Considering the matter as best I can, I cannot in this find any good reason for not giving to the statute its full effect. It is retrospective legislation of the most radical and drastic kind; but throughout the whole history of this statute retrospective amendments have been the rule rather than the exception. Apparently the Legislature has kept a watchful eye upon the statute and its operation; and, whenever an effect was found to result from its provisions which did not accord with the views of the Legislature, an amendment was promptly made, governing not only future policies and future declarations, but applicable to all then existing policies and declarations.

Bearing in mind the wide power of re-apportionment that has always existed, it may well be that the insured chose to rely upon the law as it was declared in 1912. This, however, cannot affect my decision, which must rest upon the statute as it stands.

In *Re Stewart Estate* (1912), 4 O.W.N. 293, my brother Sutherland gave similar effect to sec. 170.

The order will therefore go for payment out of the money in Court to the grandchildren; the shares of the adults to be paid forthwith, the shares of the infants as they attain majority.

The costs of the motion may well be paid out of the fund.

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[APPELLATE DIVISION.]

July 2.

ROSE V. MAHONEY.

*Principal and Agent—Claim for Commission on Sale of Land—Failure to Establish Agency—Authority of Solicitor for Vendors—Sale-agreement Signed by Vendors—Insertion of Name of Agent and Promise to Pay Commission without Knowledge of Vendors—Negligence—Liability—Recognition of Agent.*

The defendants, having land for sale, mentioned it to their solicitor, and were willing to pay him a commission if he effected a sale. They did not give him authority to employ a land agent. The solicitor drew up a sale-agreement between the defendants and an intending purchaser, and inserted in it the name of the plaintiff as the agent who had effected the sale for the defendants, and a promise on the part of the defendants to pay the plaintiff a commission. The document was not read over or explained to the defendants; they supposed it to be no more than a sale-agreement. They signed it, not knowing that the plaintiff's name or the promise was there, having no reason to suspect it, and without having had their attention directed to it by the solicitor. They knew nothing of the plaintiff nor of any agent other than the solicitor. There was evidence that the plaintiff was to give the solicitor a share of the commission:—

*Held*, that there was no negligence on the part of the defendants—if that was material—and that they were not, in the circumstances, bound by the written recognition and promise.

*Foster v. Mackinnon* (1869). L.R. 4 C.P. 704, *Lewis v. Clay* (1897). 67 L.J.Q.B. 224, and *Carlisle and Cumberland Banking Co. v. Bragg*. [1911] 1 K.B. 489, followed.

Judgment of the Senior Judge of the County Court of the County of York reversed.

APPEAL by the defendants from the judgment of the Senior Judge of the County Court of the County of York in favour of the plaintiff in an action brought in that Court to recover a commission on the sale of land for the defendants by the plaintiff.

June 17. The appeal was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., and LATCHFORD and KELLY, JJ.

*Edward Meek*, K.C., for the appellants, contended that they had not employed the plaintiff nor authorised their solicitor to employ him; if the plaintiff had brought about the sale, he must look to the solicitor for his remuneration, the solicitor having been employed by the appellants. Something was inserted in the sale-agreement which seemed to be a recognition of the plaintiff as the defendants' agent, but the defendants had no knowledge and no reason to suspect that it was so inserted; and it

was not an agreement with the plaintiff, but with the purchaser. No contract was proved by the plaintiff and no agency was established: Bowstead's Law of Agency, 5th ed., p. 113; Halsbury's Laws of England, vol. 1, p. 171; Mechem on Agency, 2nd ed., vol. 1, paras. 1701, 1702, pp. 1289-91, and cases cited; Wright's Principal and Agent, 2nd ed., p. 171. The solicitor had no authority to pledge his clients' credit: Cordery's Law of Solicitors, p. 101. There is no privity of contract between a principal and a sub-agent: *Edgar v. Caskey* (1912), 7 D.L.R. 45; Leake on Contracts, 6th ed., pp. 73, 329; Encyc. of the Laws of England, vol. 11, pp. 497-8; vol. 13, pp. 452, 455, 456, 457.

*E. R. Sugarman*, for the plaintiff, respondent, argued that the facts of the case excepted it from the general rule *delegatus non potest delegare*—referring to *De Bussche v. Alt* (1878), 8 Ch.D. 286, 310; *Powell & Thomas v. Evan Jones & Co.*, [1905] 1 K.B. 11. When a person carelessly signs an agreement, he cannot be heard to say that he did not read it: *Hunter v. Walters* (1871), L.R. 7 Ch. 75, 84; *King v. Smith*, [1900] 2 Ch. 425, 429; *Howatson v. Webb*, [1907] 1 Ch. 537, [1908] 1 Ch. 1.

July 2. KELLY, J.:—Appeal from the judgment of the Senior Judge of the County Court of the County of York in favour of the plaintiff for \$406.25 and costs, in an action for commission on a sale of real estate.

Unless the signing of the acceptance of the offer, in which was inserted the name of the plaintiff as the defendants' agent, and the promise to pay commission contained in the acceptance, preclude the defendants from denying liability, there is no ground upon which the judgment can be sustained. One cannot read the evidence without being convinced that the relationship which existed between the plaintiff and the defendants' solicitor, who drew the contract, was such that the solicitor was to share in the commission; or, rather, that any right the plaintiff might have to a commission or to share in it (apart from anything that may be deduced from the mention of the plaintiff's name in the offer and acceptance) is against the solicitor, and not against the defendants. There is no evidence that the defendants employed the plaintiff, or that their solicitor had any

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authority to appoint him as their agent, or to delegate to him or to any other person the authority given the solicitor to sell. There is positive evidence to the contrary. The trial Judge has found against the solicitor's statement that he had a half interest in the commission, and accepts the plaintiff's denial of that statement. He appears, however, to have overlooked the fact that, on the plaintiff's own evidence, he had in mind some possible right in the solicitor, when he says: "As Mr. Slattery gave me the offer of the deal, I suppose I would have given him something if I thought he was entitled to it." I think there is sufficient to indicate that the solicitor was interested in the commission.

But a more important element is that relating to the form of the offer and acceptance, in which are found the plaintiff's name as the agent and a promise by the defendants to pay him commission. I appreciate fully the importance to be attached to the defendants having executed the document in that form, and the difficulty that confronts them when they seek to avoid the consequences of that act; but the conditions surrounding this transaction, and which are not to be regarded lightly, distinguish the present from those cases in which it is held that those signing cannot be relieved from liability.

The defendants had gone to their solicitor's office, where they discussed with him the proposed sale of their property and the price and terms on which they were willing to sell. The solicitor, not then having a contract prepared for their signature, promised to prepare it and send it to them for that purpose. No mention whatever was made of paying a commission, or that any agent was intervening, though the defendants admit that they were willing to pay a commission to the solicitor. They knew nothing of the plaintiff, and had no reason to believe or suspect that he or any person other than the solicitor would have anything to do with the transaction. Such a proposal was never brought to, and never entered, their minds. The solicitor prepared the offer and acceptance in the form in which they now appear; and, the purchaser having signed the offer, it was taken by the solicitor's clerk to the defendants' residence, where, their uncontradicted evidence is, the clerk made no men-

tion whatever of the introduction into the document of the plaintiff's name, or that there was any understanding or suggestion for the payment of commission, or that the terms embodied in the documents were otherwise than as agreed upon with the solicitor, and which they expected to sign; and they then signed the acceptance. With respect to the recognition of the plaintiff as their agent and the promise to pay commission, their minds never went with their act; when they signed, they believed that they were signing what it had been arranged that they should sign and what they expected and had reason to expect the solicitor would send them for their signature, namely, an acceptance of an offer to purchase made by an intending purchaser on terms discussed and agreed upon with the solicitor and which he was instructed to embody in the contract or the offer. In the circumstances in which their signatures were procured, the defendants cannot be said to have been negligent, if negligence were here material, which I very much doubt in view of what is laid down in *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489; and they clearly cannot be said to have intended to execute a document having any reference to payment of commission. It is a case of being misled as to the nature and character of what they were signing, in so far as it related to any recognition of the plaintiff as their agent or the assuming of a liability for payment of commission.

That they are not to be held liable under the conditions which present themselves is quite supported by authority: *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704; *Lewis v. Clay* (1897), 67 L.J.Q.B. 224; *Carlisle and Cumberland Banking Co. v. Bragg*, cited above.

In my opinion, the appeal should be allowed and the trial judgment set aside, and judgment entered dismissing the action, with costs here and below.

FALCONBRIDGE, C.J.K.B., and MAGEE, J.A., concurred.

LATCHFORD, J.:—There is no evidence, apart from the written agreement, of any employment of the plaintiff by the defendants. It is also clear that they gave no authority whatever to Mr. Slattery to employ him.

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The agreement was presented to the defendants for signature by a clerk of their solicitor. The evidence is conclusive that it was not read or explained to them. They did, however, understand it to be an agreement for the sale of their property for a price which they were willing to accept; and they are bound by it as an agreement of sale. They were not informed that it provided for payment of a commission to the plaintiff, of whose existence even they had no knowledge. They trusted their solicitor; and he, through his agent and associate, the plaintiff, abused their confidence.

The judgment should be set aside with costs and judgment entered dismissing the action with costs.

*Appeal allowed.*

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[SUTHERLAND, J.]

July 9.

RE MULHOLLAND AND VAN DEN BERG.

*Will—Attempted Revocation—Invalidity—Wills Act, R.S.O. 1897, ch. 128, secs. 22, 23—Title to Land.*

A testator, some years after the execution of his will, whereby he devised and bequeathed all his property to his wife, ran his pen through the various letters of his name signed at the end of the will—leaving the name still plainly legible—and wrote below, "I hereby revoke this will," with the date and his initials. Below this he wrote, "witness to revoke," and his wife, who was present while he did these things, signed her name below these words:—

*Held*, upon an application under the Vendors and Purchasers Act, that the will was not effectually revoked: the acts of the testator did not meet the requirements of secs. 22 and 23 of the Wills Act, R.S.O. 1897, ch. 128, which was the Act in force at the time of his death; that the will was properly admitted to probate; and that the title to the land in question passed thereunder.

*Re John Drury's Will* (1882), 22 N.B.R. 318, *In the Goods of Morton* (1887), 12 P.D. 141, and *In the Goods of Godfrey* (1893), 69 L.T.R. 22, applied and followed.

MOTION by the purchaser, under the Vendors and Purchasers Act, R.S.O. 1914, ch. 122, for an order determining the validity of an objection raised by the applicant to the title to lots 1 to 20 inclusive according to plan 47 registered in the registry office for the west riding of the county of Northumberland, which lots were the subject of an agreement of sale and purchase.

July 9. The motion was heard by SUTHERLAND, J., in the Weekly Court at Toronto.

*D. Urquhart*, for the applicant.

*Grayson Smith*, for the vendor.

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July 9. SUTHERLAND, J.:—The sole question on this motion is, whether the vendor has shewn a good title to the land in question under the will of John Clark Burnham, who died on or about the 6th November, 1901, or whether such will was revoked and did not pass the title to the said land to the devisee therein named. The will is dated the 28th May, 1885. It appears that, some time after its execution, the testator, in the presence of his wife, Henrietta Burnham, to whom he devised and bequeathed all his real and personal property, ran his pen through the various letters in his signature thereto affixed and wrote below it these words: "Hamilton Tp. Jany. 30th, 1894. I hereby revoke this will made by me May 28th, 1885;" and wrote, below, his initials, "J. C. B." Below this he wrote "Witness to revoke," and his wife signed her name below these words.

Nothing more was done; and, notwithstanding the partial obliteration of the signature of the testator by the ink-marks made by his pen, the signature is still plainly legible.

After the death of the testator, application was made for letters probate to the will. The facts already stated were disclosed on such application in an affidavit made by the widow of the testator. Letters probate were thereupon issued.

The Act in force at the time of the death of the testator was the Wills Act of Ontario, R.S.O. 1897, ch. 128, secs. 22 and 23 of which are as follows:—

"22. No will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

"23. No obliteration, interlineation or other alteration made

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in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses are made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or in some other part of the will."

The expression "otherwise than as aforesaid" in sec. 22 deals with a revocation by marriage and other matters not applicable to this case.

Under sec. 22 it is apparent that the writing suggesting an intention to revoke was not executed in the manner in which a will is required to be executed, and that the "obliteration, interlineation or other alteration" was not validly done so as to come under sec. 23.

It is conceded, therefore, that it comes to be a question whether what was done by the testator can be said to be under clause 22 a revocation, under the words "otherwise destroying the same."

The Wills Act has been amended by the Act (1910) 10 Edw. VII. ch. 57, sec. 23, and carried into the present revision, R.S.O. 1914, ch. 120, sec. 23, but the part of sec. 23 quoted is the same throughout.\* All the testator did was to attempt to obliterate his signature with ink-marks. He did not effectually do this. While what he did and the words he wrote may indicate an intention, he failed in legally carrying this into effect.

In Jarman on Wills, 5th ed., p. 116, the effect of the words "otherwise destroying" is dealt with, and see also the 6th ed., p. 155, as to obliterations, interlineations, and cancellations.

In *Re John Drury's Will* (1882), 22 N.B.R. 318, it was held that where "the will was found with the seal cut out, leaving a

\*In the Wills Act as found in 10 Edw. VII. ch. 57, and R.S.O. 1914, ch. 120, secs. 23 and 24 correspond to secs. 22 and 23 of the Wills Act. R.S.O. 1897, ch. 128.

hole in the paper where the seal had been, there was a tearing of the will within the meaning of the Wills Act with the intention of breaking the will;" and in *In the Goods of Morton* (1887), 12 P.D. 141, where "a will which after execution had remained in the custody of deceased was found in her repositories after her death with her own signature and the signatures of the attesting witnesses scratched out as with a knife, that there was a revocation within the requirements of sec 20 of the Wills Act."

In *In the Goods of Godfrey* (1893), 69 L.T.R. 22, it was held that "scratching with a knife, which is a lateral cutting, unless carried by the testator to the extent of rendering his signature illegible, does not amount to a revocation within the terms of sec. 20 of the Wills Act."

Having regard to these decisions and to the explicit terms of our own Act, I am unable to see that the testator by what he did effectually revoked the will in question. I am of opinion that it was properly admitted to probate, and that it must be declared that title did pass under the will and that the vendor has shewn a good title thereunder.

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July 9.

*Highway—Nonrepair—Cement Sidewalk in City Street—Neglect to Roughen Surface—Dangerous Condition—Notice to City Corporation—Injury to Person—Knowledge of Dangerous Condition—Reasonable Care—Municipal Act, R.S.O. 1914, ch. 192, sec. 460.*

The defendant city corporation in 1900 laid a cement sidewalk upon one of the city streets, and at the time corrugated the surface so as to make it safer to walk upon. Either because the corrugation work was not effectual, or because the corrugated surface became worn by use, the walk was, at a place in front of the plaintiff's shop and dwelling, so smooth, in December, 1914, as to be dangerous in wet or frosty weather; the plaintiff, while engaged in carrying goods from a vehicle in the middle part of the street to his shop, on the 22nd December, 1914, slipped upon the smooth surface of the sidewalk, fell, and sustained injuries, on account of which he sued for damages:—

*Held*, that the corporation, having originally corrugated the surface, must be taken to have recognised that, if it should become smooth, it would be dangerous, and ought to be again roughened; that, nothing having been done to make the walk safe, it must be regarded as out of repair and dangerous; that the dangerous condition had existed for so long as



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to impute notice to the corporation; that it was this want of repair that caused the plaintiff's injury; that there was no want of care on the plaintiff's part; and that his knowledge of the dangerous condition did not stand in the way of his recovering damages from the corporation for its neglect of its statutory duty to keep the streets and walks in repair: Municipal Act, R.S.O. 1914, ch. 192, sec. 460.  
*Caswell v. St. Mary's and Proof Line Junction Road Co.* (1869), 28 U.C.R. 247, 254, and *Gordon v. City of Belleville* (1887), 15 O.R. 26, 28, 30, applied and followed.

ACTION against the Corporation of the City of Windsor to recover damages for personal injuries sustained by the plaintiff by a fall upon the sidewalk in front of his shop, upon a city street, while he was engaged in taking goods from a waggon into his shop. The plaintiff alleged that the sidewalk was improperly constructed, and was in a defective and dangerous condition and very slippery on the 22nd December, 1914, the day on which he was injured.

The action was tried before SUTHERLAND, J., without a jury, at Sandwich.

*A. R. Bartlet*, for the plaintiff.

*F. D. Davis*, for the defendant corporation.

July 9. Sutherland, J.:—The plaintiff is a green-grocer, who resides and carries on business at number 47 Goyeau street, in the city of Windsor, in the county of Essex, there being two entrances from that street to the building occupied by him, a house-entrance and a store-entrance.

From the front of the store there stretches a sloping pavement of cement of a considerable width to the point where it meets and joins the cement city sidewalk. This sloping pavement forms a wide approach to the plaintiff's store from the sidewalk, and was laid a year or two ago by him.

The plaintiff alleges that on the 22nd day of December, 1914, while he was engaged in transferring a load of celery from a vehicle in the street in front of his store into his store, on the west side of Goyeau street, and lawfully using the sidewalk which had been constructed and maintained by the defendant corporation, he slipped and fell, sustaining personal injuries. He also alleges that the cause of his doing so was the defective condition of the sidewalk, and that, as it had been constructed

many years previously and had been in the same condition as at the time of the accident for a considerable length of time, such defective condition and construction were or ought to have been well-known to the defendant. He says, further, that the sidewalk or portion thereof on which he slipped and fell sloped towards the road, "was constructed and has been worn very smooth, and is by reason of the foregoing facts very slippery, especially in wet weather, and consequently, through the negligence of the defendant, as specified above, the plaintiff sustained injury and damages."

The defendant corporation pleads a general denial of the allegations contained in the plaintiff's statement of claim, and alleges that any injury complained of by him was the result of his own negligence and could have been avoided by the exercise of reasonable care.

The facts disclosed in evidence are that this cement sidewalk was laid by a contractor for the City of Windsor in the year 1900, according to the usual specifications then in vogue therein. The surface was then corrugated, that is to say, a roller was put over it when finishing, for two purposes, to smooth the trowelling marks and to indent it so as to prevent pedestrians from slipping.

The use of corrugated cement sidewalks has been, for years past, very general, and particularly in populous municipalities. It is not even yet universal, and in small municipalities is often not done at all.

There is evidence in this case to the effect that such corrugation as was done when the walk was laid may have been more lightly done than was usual, or that when done it did not take as deep a hold on the surface as usual, for the suggested and possible reason that the cement had been allowed to harden on the top more than was suitable before the work was done. There is evidence also that, at the spot where the plaintiff fell, the pavement was smoother than elsewhere on the street, and that for some time before the accident and extending to the date of its occurrence, when the weather was frosty or rainy, people occasionally slipped and fell at that point.

The plaintiff was using this portion of the public sidewalk

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a great deal in connection with his business and must be taken to have known its condition well. He indeed says it was very smooth and that everybody slipped; that in the summer, when it was raining, it was slippery, and in the winter, when there was frost, it was worse. He had, as he said, seen many people slip there. Yet, while all this is so, he never apparently considered the walk so out of repair or dangerous as to report the fact to the defendant corporation and ask that it be made safe.

Kehoe, a witness called by him, who said that he had passed over the walk a number of times before the accident, stated that he had noticed that at the point in question the walk was very smooth and after showers of rain and in frosty weather very slippery. He thought it would be actually dangerous after a shower of rain, and expressed the opinion that it had been in the same condition for the last five years. But again, though an alderman last year, he did not seem to think it so much out of repair or so dangerous as to make it his duty to call the attention of the civic authorities to it.

It is not shewn in evidence that the defendant corporation had, before the accident, its attention in any way called to any alleged defect in the walk. Upon the city is laid the statutory duty of keeping the streets and walks in repair;\* and, under the Municipal Act, R.S.O. 1914, ch. 192, sec. 398, sub-sec. 29, it is empowered to appoint road commissioners and overseers of highways.

While it is true that "municipalities are not required to construct or maintain their streets according to an ideal standard of perfection" (MacLennan, J.A., in *Ince v. City of Toronto* (1900), 27 A.R. 410, at p. 416, and see also *Hutton v. Town of Windsor* (1874), 34 U.C.R. 487, at p. 496), it is nevertheless incumbent on them "to keep the sidewalk in such a state of repair as" is "reasonably sufficient, having regard to all the circumstances, to enable persons, using it with ordinary care, to do so safely" (Meredith, C.J., in *Ewing v. City of Toronto* (1898), 29 O.R. 197, at p. 201).

The defendant corporation laid the walk in question, and

\*See the Municipal Act, R.S.O. 1914, ch. 192, sec. 460.

at the time seemed to think it necessary to roughen the surface by corrugation so as to ensure safety to pedestrians. Either because the corporation did not do so effectually, as to which there is some evidence, or because the corrugation became worn by use, the walk was, at the place in question, undoubtedly so smooth at the time of the accident as to be dangerous in wet or frosty weather.

The corporation, having originally corrugated it, must, I think, be taken to have recognised that, if it was or became smooth, it should be repaired by further corrugation or roughened, or might become dangerous.

Counsel for the defendant corporation urged during the argument that it would be placing an excessive burden upon municipal corporations to hold that, if they permitted portions of the surface of their concrete sidewalks to become so worn by travel or otherwise as to become smooth and slippery in wet or frosty weather, it should be deemed nonrepair. I was then impressed somewhat, and am still, with the force of this argument. In consequence I have had a great deal of difficulty in knowing how to dispose of this case properly. It is clear that the walk complained of was in a similar condition for a period long enough to impute notice to the defendant corporation, if its smoothness and consequent danger in wet or frosty weather can be considered a want of repair.

There can be no doubt that a smooth surface on a concrete walk can be roughened and made safer, and that such is the main object of corrugation. There can be no doubt, I think, in this case that, if this had been done, the accident would not have occurred.

If one can appeal to what is common knowledge, smooth surfaces on concrete sidewalks are being chipped and corrugated to prevent pedestrians slipping. If other people for years could notice that this portion of the walk was so smooth that in rainy or frosty weather it was slippery and dangerous, one would think that this would be equally apparent to an inspector or overseer of the defendant corporation if he were making such reasonably careful inspection of the condition of the walks as it would be his duty to make.

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There was no evidence offered as to what inspection of the walks, if any, the defendant corporation was accustomed to make. They did not endeavour to shew, as is often done in actions for nonrepair, that the condition complained of was of such recent origin as not necessarily to impute notice thereof. Upon the facts as developed at the trial, it is plain that no such evidence could have been obtained.

In the circumstances, I have come to the conclusion and find that the walk was so out of repair as to be dangerous, that the condition had existed for so long as to impute notice to the defendant corporation, and that it was this want of repair that caused the accident. "It must be a question of fact altogether for the jury to say whether the place alleged to have been out of order was dangerous, and if so from what cause, and if from a natural cause or process whether the persons liable to repair the road could reasonably and conveniently, as regarded expenditure and labour, have made it safe for use." Wilson, J., in *Caswell v. St. Mary's and Proof Line Junction Road Co.* (1869), 28 U.C.R. 247, at p. 254.

The plaintiff will then be entitled to succeed unless his knowledge of the condition of the walk or his negligence in not exercising appropriate care, having that knowledge, will preclude. In *Gordon v. City of Belleville* (1887), 15 O.R. 26, it was held (p. 28) "that knowledge is not *per se* contributory negligence;" and Armour, C.J., at p. 30, points out the obligation resting on the person using a portion of the highway known by him to be out of repair: "Every person is entitled to use them, assuming that the corporation has performed its duty, and has kept them in repair, and the care he will be required to exercise will be commensurate with that assumption. If, however, he knows that they are not in repair, he will still be entitled to use them, but the care he will be required to exercise must be commensurate with his knowledge of their condition; he will be required to exercise such care as a prudent man would reasonably exercise in using them knowing their condition."

I do not think that I can find that there was any want of care on the plaintiff's part. Knowing of the condition of the walk, he seems, according to his evidence, to have been taking

reasonable care. In this connection it may be noted that he had made his way on the morning in question safely down from the entrance to his store to the sidewalk over a cement pavement with a very decided slope as compared to the sidewalk in question, and in all probability the reason that he was able to do so was that it had been, as the evidence, I think, disclosed, properly roughened by corrugation.

Then as to the damages. The plaintiff was confined to bed for three or four weeks and was more or less incapacitated for a period of three months in consequence of the injuries sustained. He had not apparently entirely recovered at the time of the trial. His evidence was to the effect that his business had fallen off considerably during the period that he was unable personally to give it his supervision. He places his net loss per day at \$6. His injuries, no doubt, occasioned him considerable pain.

I have come to the conclusion that the sum of \$800 would be reasonable compensation.

The plaintiff will, therefore, have judgment for that amount with costs.

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## [APPELLATE DIVISION.]

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March 27.

July 12.

*Execution—Leave to Renew—Judicial Act—"Action"—Life of Judgment—Limitations Act, R.S.O. 1914, ch. 75, secs. 2(a), 49(1)(b)—Previous Renewals—New Starting-point.*

An application made in 1915 for leave to issue execution upon a judgment recovered in 1883 was held to have been properly refused, on account of the bar imposed by the Limitations Act, now R.S.O. 1914, ch. 75, sec. 49(1)(b). What is prohibited is the bringing of an "action" after the lapse of the statutory period (20 years); and, by sec. 2(a), "action" includes any civil proceeding. The application was an "action;" and the renewal from time to time until 1905 of an execution issued in 1884, did not give a new starting-point. The present Rules relating to the issue of execution are subject to the statutory limitations; and the granting of leave is a judicial act—not a mere ministerial act, which may be done after the time limited.

*Poucher v. Wilkins* (1915), 33 O.L.R. 125, distinguished.

Viewing the order giving leave to issue execution as the equivalent of an order of revivor or the entry of a suggestion on the roll under the old practice, it would not be effectual unless the application therefor were made within the 20 years.

Review of the authorities.

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APPEAL by three of the defendants from an order of the Master in Chambers (7 O.W.N. 826) dismissing the appellants' motion for leave to issue execution upon the appellants' judgment for costs recovered in 1883 against the original plaintiff in the action.

March 23. The appeal was heard by MIDDLETON, J., in Chambers.

*C. A. Moss*, for the appellants.

*C. C. Ross*, for the executrix of the deceased plaintiff.

March 27. MIDDLETON, J.:—Appeal from an order of the Master in Chambers setting aside an execution—argued also as a motion for leave to issue execution.

The action was dismissed with costs on the 20th December, 1883; the costs were taxed at \$371.78 on the 5th January, 1884; and an execution was issued on the 25th January, 1884; and this was from time to time renewed, but finally allowed to expire. In 1891, another execution was issued, and kept renewed until November, 1905, when it was allowed to expire. This writ was issued upon præcipe and without leave.

The period of 20 years from the date of the judgment expired on the 20th December, 1903; and the real question is, whether the judgment creditor can, after the lapse of 20 years, in any way enforce his judgment. I have come to the conclusion that he cannot.

The Statute of Limitations, R.S.O. 1914, ch. 75, sec. 49 (1) (b), fixes the period at 20 years from the time the cause of action arose, and the only extension recognised by the statute is that found in sec. 54, where there is an acknowledgment or part payment.

What is prohibited is the bringing of an "action" after the lapse of the statutory period, and "action" is defined as including "any civil proceeding:" sec. 2 (a).

The Appellate Division in *Poucher v. Wilkins* (1915), 33 O.L.R. 125, has held that a renewal of an execution in force at the expiration of the 20 years is not within the prohibition of the statute, as it "was a mere ministerial act on the part of the officer of the Court by whom it was renewed."

The appellants here contend that this application is not an "action" within the statute, and that the renewal of the execution from time to time during the 20 years gives a new starting-point.

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The decision in *Farran v. Beresford* (1843), 10 Cl. & F. 319, is against the appellants. A judgment was obtained in 1810, and in 1837 a *sci. fa.* was issued, to which the defendant pleaded the Statute of Limitations. The plaintiff replied setting up an earlier *sci. fa.* within the 20 years. The Court held the plea good and the reply bad as a departure. Tindal, C.J., gave the opinion of the Judges who were called in to advise. In this opinion it is stated that the statute began to run the moment the judgment was recovered, and that there was no warrant for adding to the exceptions provided by the statute, of acknowledgment and payment, a new exception "judgment revived," "more especially as such exception might have the effect of enlarging the time of proceeding for the recovery upon judgments to an indefinite period." "A *scire facias* is neither a payment nor an acknowledgment in writing." The judgment upon the *sci. fa.* in 1817 would have been a new judgment upon which an action might have been brought within 20 years, but the *sci. fa.* then in question was upon the judgment of 1810, and not that of 1817.

The history of proceedings to enforce judgments must be understood in order to appreciate some of the cases.

"At the common law a presumption arose from a plaintiff's delay beyond a year, that his judgment either had been satisfied, or from some supervening cause ought not to be allowed to have its effect in execution. After such delay, therefore, he was not allowed to issue execution as a matter of course, but was driven to bring a new action on the judgment. The *scire facias*, which had been in use at the common law, for the purpose of executing judgment in real actions, after a year and day's delay, was therefore adopted by the statute as a less expensive and dilatory course for the plaintiff, and as equally affording protection to the defendant:" *per* Lord Denman in *Hiscocks v. Kemp* (1835), 3 A. & E. 676, 679. The statute referred to was the Statute of Westminster 2 (13 Edw. I., stat. 1, ch. 45).



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An exception to the rule based upon the presumption was where an execution had been issued within the year, but had not been executed. This negated the presumption: *per Parke, B.*, in *Simpson v. Heath* (1839), 5 M. & W. 631, 635. To remedy this state of affairs the Common Law Procedure Act of 1852, sec. 128, provided for the issue of an execution at any time within 6 years from the judgment, as between the original parties, and, by sec. 129, for the issue of execution where there had been a change of parties or lapse of this time, either by writ of revivor or upon suggestion entered upon the roll by leave to be obtained upon summons. A writ of revivor was allowed without preliminary rule when the judgment was less than 10 years old, and when more than 15 only on a rule after a summons to shew cause (sec. 134).

The change in procedure was not intended to make any change in the substantive rights of the parties; and, though no time-limit was found in the Common Law Procedure Act, it was always held that the application to enter a suggestion or for a writ of revivor must be made within the statutory period: *Loveless v. Richardson* (1856), 2 Jur. N.S. 716; *Williams v. Welch* (1846), 3 D. & L. 565.

All this leads me to the conclusion that the present Rules relating to the issue of execution are subject to the statutory limitations, and that the obtaining of leave is a judicial act, and not a mere ministerial act, which may be done after the time limited.

The decision of the Chancellor in *Price v. Wade* (1891), 14 P.R. 351, that, apart from any statutory limitation, the judgment is presumed to be satisfied, is left untouched by the decision in *Poucher v. Wilkins*, and it, as well as *Farrell v. Gleeson* (1844), 11 Cl. & F. 702, justifies the view that the proceedings under the Rule are in effect more than a mere continuation of the former suit—for it must be remembered that the *sci. fa.* there mentioned was not an “original writ” but a judicial writ under the Statute of Westminster.

For these reasons, the motion must be dismissed, and costs should follow.

The three defendants appealed from the order of MIDDLETON, J.

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May 4. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

C. A. Moss, for the appellants, relying on *Poucher v. Wilkins*, 33 O.L.R. 125, argued that the renewal of the execution from time to time within the 20 years gave a new starting-point to the Statute of Limitations, now R.S.O. 1914, ch. 75; and that, as this application was not an "action" within the meaning of the statute, it should be granted. An order permitting the issue of execution is the equivalent of an order of revivor or the entry of a suggestion on the roll, as in the former practice. Counsel referred also to *Price v. Wade*, 14 P.R. 351; *Allison v. Breen* (1900), 19 P.R. 119, 143; and *In re Woodall* (1904), 8 O.L.R. 288.

C. C. Ross, for the respondent, relied upon the reasons for judgment of MIDDLETON, J.

July 12. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by three of the defendants from an order of Middleton, J., dated the 27th March, 1915, dismissing their appeal from an order of the Master in Chambers of the previous 15th December, 1914, refusing leave to issue execution on the appellants' judgment against the respondent's testator, the plaintiff in the action.

The judgment was recovered on the 20th December, 1883, and there has been no payment on account of it and no acknowledgment sufficient to make a new starting-point for the running of the Statute of Limitations, if that statute applies.

Executions against goods and lands were issued and placed in the sheriff's hands, and were renewed from time to time. One of them (an alias writ) was issued by leave of the Master in Chambers, granted by an order dated the 17th November, 1905; but it was issued after the expiry of the 20 years; and there was no execution in force at the time of the application to the Master in Chambers which resulted in the making of his order of the 15th December, 1914, and more than 20 years from the date of the recovery of the judgment had then expired.

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It was decided by this Court in *Poucher v. Wilkins*, 33 O.L.R. 125, that where an execution had been issued within 20 years from the date of the judgment, had been kept alive by renewals, and was in force at the expiration of the 20 years, the right of the execution creditor to renew it and keep it renewed was not barred by the Statute of Limitations or otherwise.

The view of the Court in that case was that, where the execution is in force at or after the expiration of the 20 years, the renewal is but the ministerial act of an officer of the Court, and is not a civil proceeding within the meaning of the Limitations Act, R.S.O. 1914, ch. 75, sec. 49; but the question which has arisen in this case was left open and is untouched by the decision in that case.

I see no reason for differing from the conclusion of my brother Middleton, which seems to be well supported by the cases to which he refers, and I can usefully add little to the reasons which he gives for the conclusion to which he came.

It was argued for the appellants that the order giving leave to issue execution is the equivalent of an order of revivor or the entry of a suggestion on the roll under the old practice; but granting this does not help the appellants, for the proceedings to revive or to obtain leave to enter the suggestion, to be effectual, must have been taken within the 20 years; and it follows that the application for leave to issue execution, having been made after the expiry of that period, was too late.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

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May 11.  
July 12.

*Covenant—Conveyance of Land—Building Restriction—Negative Easement—Dominant and Servient Tenement—Effect of Tax Sale and Conveyance—Assessment Act, R.S.O. 1914, ch. 195, secs. 94, 178—Vendor and Purchaser—Objection to Title.*

A restrictive covenant in regard to building, contained in a deed of conveyance of land, creates an equitable interest analogous to a negative easement, requiring for its creation and continuance a dominant and servient tenement. If there is a dominant tenement, the owner, and he alone, can claim the benefit of the covenant. If there is not such a tenement, the claim upon the covenant, as against subsequent assignees or purchasers,

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entirely ceases, although the personal claim by the covenantee against the covenantor may still exist; and, if the claim is a mere personal one, it cannot form the basis of a valid objection to the title.

*London County Council v. Allen*, [1914] 3 K.B. 642, and *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, [1906] 1 Ch. 386, followed.

But, even where there are lands in the position of a dominant tenement, a subsequent sale and conveyance for taxes has the effect of conveying the land, free from any claim under the covenant, to the tax purchaser. Sections 94 and 178 of the Assessment Act, R.S.O. 1914, ch. 195, considered. *Tomlinson v. Hill* (1855), 5 Gr. 231, and *Soper v. City of Windsor* (1914), 32 O.L.R. 352, followed.

*Essery v. Bell* (1909), 18 O.L.R. 76, considered.

Decision of MIDDLETON, J., upon an application under the Vendors and Purchasers Act, reversed.

MOTION by the vendors, Charles A. Hunt and Clara C. Eaton, under the Vendors and Purchasers Act, R.S.O. 1914, ch. 122, for an order declaring that an objection made by the purchaser of land to the title was not valid.

May 6. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*Merritt A. Brown*, for the vendors.

*J. H. Bone*, for the purchaser, Sidanna May Bell.

May 11. MIDDLETON, J.:—Motion under the Vendors and Purchasers Act to determine an important and very difficult question of title.

The property is situated in High Park avenue, Toronto. Daniel Clendennan, who originally owned the whole tract, sold and conveyed on the 26th May, 1891, the deed containing a covenant by the purchaser that every house, building, or erection at any time placed upon the lands shall be placed at a distance of not less than 30 feet back from the street-line. This covenant is one which would run with the land.

In 1898, the lands were sold for taxes, and by the Ontario statute 8 Edw. VII. ch. 118, sec. 18, the tax sale was confirmed, notwithstanding certain possible irregularities.

The tax deed purports to grant land in fee simple, and makes no mention of the building restrictions. The house erected upon the land does not comply with the building restrictions. The main wall of the house is more than 30 feet from the street line, but a substantial porch or projection is too near the highway. This probably forms part of the house within the mean-

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ing of the covenant; the covenant covers not only the house but every building or erection.

It may well be that this transgression is of so trifling a character that no mandatory order would ever be made directing the demolition of the building, but the purchaser is quite right in taking the position, if she so desires, that under the contract she is not called upon to take the risk of a possible law-suit.

The neat question is this: whether the effect of a tax sale is such as to render the covenant no longer binding.

By the Assessment Act, now R.S.O. 1914, ch. 195, sec. 94, it is provided that taxes are "a special lien on the land in priority to every claim, privilege, lien or incumbrance of every person except the Crown."

It is laid down in many American cases and by text-writers that the question whether the estate taken by the purchaser is free from existing obligations and restrictions operative against the assessed owner, depends entirely upon the legislative intention.

In some jurisdictions, title having been derived from the State is regarded as forfeited to the State by the failure to pay taxes. The title derived from a tax sale is then in the nature of a new grant from the State. The previous chain of title is at an end. The purchaser takes a new and original title, entirely disconnected from that of the former owner and in no way clogged or incumbered with previous liens or collateral interests.

In other jurisdictions the theory is entirely different. The assessment is against the owner. His estate and interest are the things assessed, and that which is assessed is that which is sold, and the tax has precisely the priority conferred upon it by the statute authorising the taxation, and in that way the title which is passed on to the purchaser is that of the original owner, free of certain liens and incumbrances when the statute so provides.

The question of the effect of our statute has arisen; so far as I know, only three times in our Courts.

First, in the case of *Tomlinson v. Hill* (1855), 5 Gr. 231, where the question was whether a tax sale extinguished the

dower-right of the wife of the owner. Chancellor Blake held that it was extinguished: "It is quite clear, I think, that the land tax is made a charge upon the property itself, to the payment of which all persons having any interest in the land are bound to look; and it follows that a conveyance by the sheriff in pursuance of the sale for arrears of taxes operates as the extinguishment of every claim upon the land and confers a first title under the Act of Parliament."

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In *Essery v. Bell* (1909), 18 O.L.R. 76, land which was subject to an easement of a right of way was sold for non-payment of taxes. My Lord the Chancellor held that the defendant who had purchased at the tax sale, and who sought to interfere with the right of way on the strength of the tax purchase, failed in his defence because the tax sale was not properly proved; the tax deed alone being produced. My Lord, although resting his decision upon this ground, discussed the wider question. He points out that there is no provision in the Municipal Act for taxing easements, and then says (p. 79): "Certainly it would be an extraordinary state of the law if, by the sale of the servient lot, the title to the easement could be extinguished, and that without any notice to the person who uses it, or any opportunity given for him to exonerate the land by the payment of taxes."

The third case is the recent decision in *Soper v. City of Windsor* (1914), 32 O.L.R. 352, where the Appellate Division had to consider the rights of an owner who had purchased at a sale for taxes, resulting from his own default, as against a claim by one who was in possession before the tax sale, but who had not acquired a possessory title unless the possession prior to the sale could be considered. The Court held that the owner could purchase, and that the tax deed created a new commencement of title, free from any claim arising from the adverse possession, and adopted without qualification the statement of the law found in *Tomlinson v. Hill*.

I have had the privilege of discussing this case with one of the Judges of the Appellate Division, and he agrees with me that none of the decided cases determines the point now arising for decision.

Where, as here, there was a building restriction applicable

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to a considerable territory, it would certainly be most anomalous that the whole building scheme should be upset, and full and unrestricted right of building to the street line should be given by a tax sale. I should hesitate long before giving such a wide effect to any language not absolutely plain and unambiguous.

Turning to the statute, which must be the foundation, I find that the Legislature has given to the lien for taxes priority to every claim, privilege, lien, or incumbrance; and, as priority is given, the tax sale must defeat every claim, privilege, lien, or incumbrance of every person except the Crown. I do not think that these words should be extended beyond their literal meaning; and it seems to me that the right based upon a restrictive covenant is certainly not a lien or incumbrance upon the land, nor do I think it is a claim or privilege, within the meaning of the statute. It is not a claim or privilege *quoad* the land, but it is a personal right against the owner of the land.

There is a certain analogy between the problem now in hand and that discussed in *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, [1906] 1 Ch. 386. It was there held that where possessory title was acquired by a trespasser this title was nevertheless subject to a restrictive covenant binding upon the holder of the paper title.

For these reasons, it appears to me that the objection to the title is well taken.

In view of the comparatively small injury done to the adjoining owners, possibly a release of any right of action might be obtained from them, and with this the purchaser may be content. If this cannot be arranged, the parties might consider whether, on the title being brought under the Land Titles Act, a modification of the covenant could be obtained under sec. 99 of that Act. I do not say that this can be done, but merely suggest the matter for consideration.

The vendors appealed from the order of MIDDLETON, J.

June 8. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and KELLY, J.

*Merritt A. Brown*, for the appellants.

*J. H. Bone*, for the respondent.

The points raised by counsel are mentioned in the judgments. The following authorities, in addition to some of those referred to in the judgments, were cited by counsel: *Cotter v. Sutherland* (1868), 18 U.C.C.P. 357; *Tulk v. Moxhay* (1848), 18 L.J. N.S. Ch. 83, 2 Ph. 774; Halsbury's Laws of England, vol. 25, paras. 828, 829, 833, 834; *Long v. Gray* (1913), 58 Sol. J. 46; *McConnell v. Beatty*, [1908] A.C. 82.

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July 12. GARROW, J.A.:—Appeal by the vendors, Charles A. Hunt and Clara C. Eaton, in a vendors and purchasers matter, from the order of Middleton, J., sustaining certain objections to the title made by the purchaser, Sidanna May Bell.

The land in question is part of lot No. 32 on the east side of High Park avenue, in the city of Toronto. This land with other adjoining lands was all at one time owned by Daniel Clendennan. On the 26th May, 1891, by a conveyance duly registered, Clendennan, his wife joining to bar dower, sold and conveyed the parcel in question, in fee simple, to Harriet E. Washington. The consideration expressed is \$1,200. The deed contained a restrictive covenant in the terms following: "It is hereby covenanted that every house, building or erection at any time placed on said lands on High Park avenue, or any part thereof, shall be so placed at a distance of not less than 30 feet back from the street-line of High Park avenue, and shall cost not less than \$1,500 exclusive of lands; and it is further covenanted that a covenant similar hereto shall be inserted in all deeds and conveyances of the said lands made and executed by the said Harriet E. Washington, her heirs, executors, administrators, or assigns."

Whether Clendennan had, at the date of that conveyance, disposed of or still retained the adjoining lands, or any part thereof, does not clearly appear; nor does it clearly appear that in the case of other sales made by him he obtained similar covenants from the purchasers.

The lands now in question were subsequently sold for taxes—the conveyance, duly registered, bearing date the 26th November, 1898. The vendors' title is derived solely through the tax deed. The house erected upon the land does not comply with



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the covenant, if in force. The non-compliance is not, apparently, extensive, but is substantial, as is in effect conceded.

The vendors contend that the effect of the sale and conveyance for taxes was wholly to eliminate the before-mentioned restrictive covenant as in any way affecting the title. They also claim the benefit of the curative effect of the statute 8 Edw. VII. ch. 118, sec. 18.

Middleton, J., in his judgment, said: "Turning to the statute" (the Assessment Act), "which must be the foundation, I find that the Legislature has given to the lien for taxes priority to every claim, privilege, lien, or incumbrance; and, as priority is given, the tax sale must defeat every claim, privilege, lien, or incumbrance of every person except the Crown. I do not think that these words should be extended beyond their literal meaning; and it seems to me that the right based upon the restrictive covenant is certainly not a lien or incumbrance upon the land, nor do I think it is a claim or privilege, within the meaning of the statute. It is not a claim or privilege *quoad* the land, but it is a personal right against the owner of the land." And, after referring to several cases, he reached the conclusion that the objection based upon the covenant was a valid and sufficient objection to the title.

With that conclusion I am, with deference, quite unable to agree. The nature and effect of restrictive covenants have been under consideration in many recent cases. One of the latest is *London County Council v. Allen*, [1914] 3 K.B. 642, where such a covenant is spoken of as creating something in the nature of a negative easement, requiring for its creation and continuance a dominant and a servient tenement as in the case of ordinary easements; or, as put by Scrutton, J., at p. 672, it is "an equitable interest analogous to a negative easement." See also *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, and, in appeal, [1906] 1 Ch. 386; *Milbourn v. Lyons*, [1914] 1 Ch. 34, and, in appeal, [1914] 2 Ch. 231.

Under these authorities it is clear that, if there is a dominant tenement, the owner, and he alone, can claim the benefit of the covenant. If there is not such a tenement, the claim upon the covenant, as against subsequent assignees or purchasers, en-

tirely ceases, although the personal claim between the original covenantor and covenantee may still exist. And, if the claim has become a mere personal claim against the owner, as the learned Judge seemed to think this is, it cannot, in my opinion, form the basis of a valid objection to the title.

The matter must, however, in the absence of definite information as to the ownership of the adjoining lands, be considered from the other view-point, that there may be lands in the position of a dominant tenement entitled to claim the benefit of the covenant, as, in the language of the cases to which I have referred, creating an "equitable interest analogous to a negative easement" in the vendors' lands, which would, I think, be a valid objection; and the effect upon such a claim of the sale and conveyance for taxes.

The case is unaffected, I think, by the statute 8 Edw. VII. ch. 118, sec. 18, which was intended mainly to cure defects in procedure.

With reference to the main question, my opinion is, that the sale and conveyance for taxes had the effect of conveying to the purchaser the land free from any claim under the covenant. The effect of such a sale was declared, in brief but explicit terms, as long ago as 1855, in *Tomlinson v. Hill*, 5 Gr. 231, quoted and followed, as recently as last year, by a Divisional Court of the Appellate Division, in *Soper v. City of Windsor*, 32 O.L.R. 352. The language of the Chancellor is: "It is quite clear, I think, that the land tax is made a charge upon the property itself, to the payment of which all persons having any interest in the land are bound to look; and it follows that a conveyance by the sheriff in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title under the Act of Parliament."

Remarks in part of somewhat similar purport were made by me in *In re J. D. Shier Lumber Co. Assessment* (1907), 14 O.L.R. 210, at p. 221. See, also, as an expression of legislative policy upon the subject, sec. 178 of the Assessment Act, R.S.O. 1914, ch. 195, which, although recently re-enacted, is not new: it declares that the sale, followed by the conveyance, "shall be valid and binding, to all intents and purposes, except as against

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the Crown, unless questioned before some Court of competent jurisdiction within two years from the time of sale.”

In *Essery v. Bell*, 18 O.L.R. 76, the learned Chancellor, in the case of a legal easement, while deciding the case upon another ground, seemed to be inclined to the opinion that the title to an easement cannot be extinguished by a sale for taxes of the servient tenement, without notice to the person who uses it and without opportunity for him to exonerate the land by payment of the taxes.

In the recent case, before referred to, of *Soper v. City of Windsor*, 32 O.L.R. 352, Riddell, J., at p. 370, says that any argument based upon the learned Chancellor's view is fully met by sec. 178, to which the learned Chancellor does not refer, although it was then in force. However that may be, it is difficult to see in the legislation any intention, directly or even indirectly, especially to benefit or protect persons entitled to easements, or to place them on a higher footing as to notice of assessment or otherwise, than the wife of an owner in respect to her dower, or his creditor claiming under judgment and execution, or even under a direct charge by way of mortgage created by him, all of which would, without any notice of assessment or otherwise, have been concluded by a completed tax sale at the time that the sale in question was made.

In 1904, by sec. 165 of the Assessment Act, 4 Edw. VII. ch. 23, sec. 165, for the first time, notice to mortgagees or other direct incumbrancers was provided for—but notice, it will be observed, not of the assessment proceedings, but simply of the opportunity, within 30 days, to redeem.

For these reasons, I am of opinion that the objection on which the purchaser relies is not a valid objection, and that the appeal should be allowed.

I understand that we are not required, owing to an agreement between the parties, to deal with the question of costs.

MEREDITH, C.J.O., and MACLAREN and MAGEE, J.J.A., concurred.

KELLY, J.:—The vendors claim title to the land in question—part of lot 32 on the east side of High Park avenue, in Tor-

onto—under a tax deed of the 26th November, 1898. A former owner of this and other land adjoining it, by conveyance of the 6th May, 1891, conveyed this land to Harriet E. Washington, the conveyance containing a restrictive covenant "that every house, building or erection at any time placed on said lands on High Park avenue, or any part thereof, shall be so placed at a distance of not less than 30 feet back from the street-line of High Park avenue, and shall cost not less than \$1,500 exclusive of lands; and it is further covenanted that a covenant similar hereto shall be inserted in all deeds and conveyances of the said lands made and executed by the said Harriet E. Washington, her heirs, executors, administrators, or assigns." The house now upon this land is so situated as to constitute a violation of this covenant.

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The position of the present parties is this: the purchaser sets up non-observance of the restrictive covenant as a substantial objection to the title; the vendors contend that the sale for taxes and the tax deed discharge the lands from its operation and effect. The appeal is by the vendors from an order of Mr. Justice Middleton, who held in favour of the purchaser.

The appellants invoke the provision of the Assessment Act (in force at the time of the tax sale) by which the taxes on any land are a special lien upon it having priority to every claim, privilege, lien, or incumbrance of every person except the Crown. A sale to realise the taxes in respect to which such special lien exists must be taken to defeat every claim, privilege, lien, or incumbrance over which that lien has priority.

Mr. Justice Middleton proceeded on the ground that the right based on a restrictive covenant is not a lien, incumbrance, claim, or privilege, within the meaning of the statute. With this view I am, after mature deliberation, unable to agree. What is sold at the tax sale is the land itself, and not the interest of the person in default for taxes. The language of the statute is comprehensive; and, to uphold the order appealed from, it would require some expression of authority that this restrictive covenant and any right or privilege based upon it are to be excepted from the claims, privileges, liens, or incumbrances over which the special lien for taxes takes priority. The trend

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of the Canadian cases is against a narrow meaning being given to the words of the statute.

In *Tomlinson v. Hill*, 5 Gr. 231, it is stated that "the land tax is made a charge upon the property itself, to the payment of which all persons having any interest in the land are bound to look; and it follows that a conveyance by the sheriff in pursuance of a sale for arrears of taxes is an extinguishment of every claim upon the land and confers a perfect title under the Act of Parliament." No exception is there made in favour of the claim or rights of any other person. The statute in force when the tax deed now in question was made, R.S.O. 1897, ch. 224 (sec. 149), was substantially the same as that in effect when *Tomlinson v. Hill* was decided. The claim there held to have been extinguished was an inchoate right to dower.

In the recent case of *Soper v. City of Windsor*, 32 O.L.R. 352, the views expressed by members of the Court are in accord with the decision in *Tomlinson v. Hill*, and they put no such restricted meaning on the statute as is contended for by the respondent. I can find no case going the length of holding that a restrictive covenant such as this forms an exception to or is not included in the rights or interests (claim, privilege, lien, or incumbrance) over which the special lien is given priority. There are, on the other hand, authorities to the effect that such a covenant is within what is made subject to that priority.

In *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, Farwell, J. (at p. 396), speaking of covenants restricting the enjoyment of land, said: "If the covenant be negative, so as to restrict the mode of use and enjoyment of the land, then there is called into existence an equity attached to the property of such a nature that it is annexed to and runs with it in equity: *Tulk v. Moxhay*, 2 Ph. 774. This equity, although created by covenant or contract, cannot be sued on as such, but stands on the same footing with and is completely analogous to an equitable charge on real estate created by some predecessor in title of the present owner of the land charged."

If this be a correct opinion, then the claim based on the covenant now under consideration is brought within the class

of claims or privileges over which the lien for taxes takes priority. Accepting this as the correct view, it is easy to conceive of a case of apparent hardship in this mode of extinguishing the operation and effect of a covenant which is or may be of material benefit to an owner of lands adjacent to or in the vicinity of the lands to which such covenant attaches; but, on consideration, that hardship will be found apparent rather than real. The Assessment Act in force at the time of the tax sale and tax deed made it necessary (as the present Act now makes it necessary) that, before a sale, a list of lands liable to be sold for taxes shall be published, by various means therein specified, with the object of ensuring the protection which such publication gives by way of notice to those in any way interested in the lands to be sold. The tax being a charge upon the property itself, to the payment of which all persons having any interest in the land are, as was said in *Tomlinson v. Hill*, bound to look, they are not exonerated from exercising vigilance in protecting their rights.

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After a very careful consideration of that part of the statute by which the special lien for taxes is given priority over other charges, I have concluded—contrary to my inclination during the progress of the argument—that the effect of the tax deed was to extinguish the rights based upon this restrictive covenant.

The regularity of the sale is not attacked, nor could any attack after such a lapse of time be hopeful of success, in view of sec. 209 of the Act (R.S.O. 1897, ch. 224.)

In my judgment, the appellants are entitled to succeed.

*Appeal allowed.*

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## [APPELLATE DIVISION.]

## KALBFLEISCH V. HURLEY.

*Mechanics' Liens—Material-men—Date of Last Delivery of Material—Conflicting Evidence—Finding of Master—Appeal—Time for Registration—Material Delivered on Owners' Premises to be Used in Building—Absence of Evidence to Shew Actual Use—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 6, 22.*

Upon appeal by the owners from the judgment of a Local Master declaring lienors entitled to the enforcement of liens, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, against the appellants' lands, it was *held*, upon conflicting evidence, that the finding of the Master that the last delivery of material was on the 21st September, 1914, should be affirmed; and that the registration of the claim of lien on the 21st October, 1914, was within the 30 days prescribed by the statute, sec. 22.

*Held*, also, that, although there was no evidence that the material last delivered was ever used in the construction of the building, it was sufficient that that material was delivered for the purpose of being used in the building: it was material "placed or furnished to be used." within the meaning of sec. 6.

*Brooks-Sanford Co. v. Theodore Telier Construction Co.* (1910), 22 O.L.R. 176, considered and distinguished.

*Bunting v. Bell* (1876), 23 Gr. 584, overruled.

*Dictum* of MacMAHON, J., in *Larkin v. Larkin* (1900), 32 O.R. 80. at p. 98, approved.

Judgment of the Local Master at Stratford affirmed.

APPEAL by the defendants J. J. Hurley and E. Hurley, the owners, from the judgment of the Local Master at Stratford, in a proceeding under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, declaring the plaintiffs and other lienors entitled to the enforcement of liens against the appellants' lands.

May 7. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and KELLY, J.

*R. S. Robertson*, for the appellants, argued that the Master was wrong in finding that the last delivery of material was on the 21st September, 1914. If that finding should be reversed, then the lien was not registered in time. Even if the lien was registered in time, the material was not furnished or used in such a manner as to entitle the respondents to a lien, because there was no evidence to shew that the lumber was used in the construction of the building. He referred to *Larkin v. Larkin* (1900), 32 O.R. 80; *Brooks-Sanford Co. v. Theodore Telier*

*Construction Co.* (1910), 22 O.L.R. 176, at pp. 179 and 181; *Ludlam-Ainslie Lumber Co. v. Fallis* (1909), 19 O.L.R. 419; *Bunting v. Bell* (1876), 23 Gr. 584.

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*F. R. Blewett*, K.C., for the plaintiffs and other lienors, respondents, contended that, as regarded the date of the last delivery of material, the Master's finding on this question of fact should not be reversed. On the question of law involved, it was not necessary to shew that the material actually went into the building in order to have the lien attach. All that the Act required was that the material should have been placed on the land for the purpose of being used in the construction of the building—and that was proved. He referred to sec. 6 of the Act.

July 12. The judgment of the Court was delivered by HODGINS, J.A.:—Appeal by the defendants the owners against the allowance by the Local Master at Stratford of mechanics' liens in favour of the plaintiffs and of two other lien-holders.

The appeal turns on two points: first, was the Local Master right or wrong in holding that the last delivery of material was on the 21st September, 1914; and second, was that material furnished or used in such a manner as to entitle the respondents to a lien upon the appellants' land?

The items said to have been delivered on the 21st September, 1914, were 20 pieces of pine lumber of the value of \$4.55. If there is any case in which the decision of the Master should be upheld, it should be here. The contest revolved around the delivery and use of these pieces of lumber, and the Local Master took evidence at great length, there being 275 pages of type-written evidence filed on the appeal. The attack by the appellants' counsel involved the question of the reliability of the contractor, Coughlin, and the improbability or inconclusiveness of the evidence of other witnesses; so that it is a case in which an appellate Court should not reverse the Local Master on a question of fact, unless convinced that he arrived at a wrong conclusion. The argument of counsel and the evidence cited and discussed shew beyond any question that the point in dispute was, while very small,



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one that required a careful analysis of the evidence. The learned Master's judgment seems to leave nothing lacking in that respect.

It must be taken as established that the delivery of the pine lumber was upon the 21st September, 1914, and therefore that the mechanic's lien registered on the 21st October, 1914, was within the 30 days prescribed by the statute.

Upon the second point reliance was placed on the case of *Brooks-Sanford Co. v. Theodore Telier Construction Co.*, 22 O.L.R. 176. The learned Master finds that, although the delivery upon the lands now charged with the lien was completed on the 21st September, 1914, there was no evidence that the lumber in question was ever used in the construction of the building. His finding upon the other branch of the case, however, involved the fact that the delivery was for the purpose of the materials being used in the building. The statute, R.S.O. 1914, ch. 140, sec. 6, provides that "any person who . . . furnishes any materials to be used in the making, constructing, (or) erecting . . . of any . . . building . . . shall by virtue thereof have a lien for the price of such . . . materials upon the erection, building, . . . land . . . upon which such materials are placed or furnished to be used." The *Brooks-Sanford* case is clearly distinguishable when the exact ground upon which it is decided is examined. Moss, C.J.O., in discussing the items in that case, valued at 84 cents, described them as 4 coach-screws or expansion balls and 4 expansion shields, the use of which was suggested by the contractor with a view to settle a dispute as to whether the contract called for safety-gates to the elevator. He then proceeds (p. 179): "The articles in question were procured by the construction company for the purpose of making the experiments, but, as the assistant-manager of the construction company testified, they were never intended to be used except for the purpose of experimenting. . . . Their (i.e., the owners') only connection with them was that they were brought to their premises for the purpose of a demonstration, which came to naught. So far as they were concerned, these articles stood in no higher position than tools or implements used by workmen in their trades." Mr. Justice

Riddell says as follows (p. 183): "Whatever may have been the intention of the respondents, it cannot be said that the materials were furnished for any other than the experimental purpose already spoken of—and this is not, in my opinion, within the Act."

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The experiment which has been referred to in the two passages I have quoted was a trial of the screws and shields to see if they would answer as a substitute for safety-gates of the elevator; the contractors disputing their liability, meanwhile, to provide either the gates or the substitute. It is manifest, therefore, that these articles were not, as the statute requires, supplied or furnished to be used in the building, but were intended to be used only for the purpose of making an experiment, and not intended for use in the building, even if experimentally successful. It is true that in that case the learned Chief Justice (with whom my brothers Garrow and MacLaren agreed) expresses (p. 180) his assent to the view taken by the late Vice-Chancellor Proudfoot in *Bunting v. Bell*, 23 Gr. 584, that the statute did not and does not go far enough to compel the owner to pay his contractor's indebtedness for that which does not go into or benefit his property. But this opinion was not necessary for the decision of the case, and is therefore not binding upon this Court; nor, if it was, does this case go so far as to offend against the principle then acquiesced in.

The difficulty in accepting *Bunting v. Bell* as a satisfactory exposition of the then Mechanics Lien Act is, that it depends upon the suggestion that otherwise the owner would be compelled to pay his contractor's indebtedness for material which had not in any way enhanced the value of his land. This is met by the clause in the Act, not alluded to in the judgment, limiting the owner's responsibility to the amount payable to his contractor (1874, 38 Vict. ch. 20, sec. 3), and with that limitation the apparent injustice cannot exist.

In *Larkin v. Larkin*, 32 O.R. 80, a Divisional Court consisting of Meredith, C.J., Rose and MacMahon, JJ., discussed the question as to whether a lien could arise upon the materials themselves, when delivered upon the land, but without being affixed thereto. The Chief Justice expressed the opinion (p.

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89) that sec. 4 "gives the benefit of the lien upon the erection, building, etc., and the lands occupied thereby or enjoyed therewith . . . upon which the materials are placed or furnished to be used." He further says (p. 89): "The effect of this section is no doubt to give to the material-man who places or furnishes materials to be used in the erection of a building, a lien, although the materials are not in fact used for the purpose for which they are supplied; but the lien is upon the building and the land occupied or enjoyed with it, or the land upon which the materials are placed or furnished to be used, and only on the building or the land, as the case may be, and not on the materials, unless they have become part of the building or land." And at p. 90: "The purpose of the Act was to give a lien upon land which at common law did not exist, and the sections giving the lien standing alone, beyond question confine the lien to the land and its appurtenances—and that cardinal principle of the Act is not in my opinion to be departed from, unless the language which is relied on to extend the lien to something that is not land, is plain and unambiguous." Rose, J., at p. 94, says: "The effect of these provisions seems to me to be that when materials are placed or furnished, to be used upon land incumbered by a prior mortgage, as such material may not be removed, it is to be taken to be incorporated with the land for the purposes of the lien to the same extent as if it were placed in the building erected or in course of erection; and that the person furnishing the material has, as against the mortgagee, a prior lien upon the value of the land to the extent of the increase of such value by the placing or furnishing of such materials." MacMahon, J., also says, at p. 98: "If no lien existed in favour of the material-man, unless the material was incorporated into the building on the land, the provision seemingly made in his favour by this section would be wholly illusory if not meaningless."

In *Ludlam-Ainslie Lumber Co. v. Fallis*, 19 O.L.R. 419, another Divisional Court, consisting of Mulock, C.J., Clute and Latchford, JJ., dealt with the question of whether a lien attached on delivery to the contractor of material which never reached the land of the owner. Clute, J., in delivering the

judgment of the Court, says (p. 424): "Is the sub-contractor entitled to his lien as soon as he delivers the material to the contractor, no matter whether it be placed upon the land or incorporated in the building or not? I cannot think that this is the true construction of the Act, the meaning of which I take to be that where the owner of the land receives the benefit of the labour or material a lien attaches, not to the material furnished, but to the land, because the owner is benefited thereby, and it may be that such lien attaches if the material is furnished upon the land to which the lien may attach, even although not incorporated in the building, if the same is under the control of the owner. This, I think, is apparent, having regard to the various sections of the Act." And at p. 427: "Under the Act as it now stands, I am of opinion that it is essential before the lien can arise that the material should be furnished and placed upon the land upon which the lien is claimed."

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It seems to me, with respect, that Mr. Justice MacMahon's remark in the *Larkin* case is well-founded. The lien for furnishing cannot, without seriously detracting from the value of the Act, be restricted to goods supplied to the owner direct, and to the person immediately furnishing to him.

The language of the present Act (sec. 6) is very wide—"any person who . . . furnishes any materials to be used . . . for any owner, contractor or sub-contractor, shall by virtue thereof have a lien." If, as suggested by Moss, C.J.O., in the *Brooks-Sanford* case, these words are to be read distributively, it is difficult to see just how that can be done consistently with the language used or the other provisions of the Act.

The lien arises immediately upon the furnishing (secs. 6, 8), and it must be registered, under sec. 22, within 30 days after the furnishing or placing of the last material. This is not consistent with the exposition of sec. 6 given by the Chief Justice when he says (22 O.L.R. at p. 181): "His land may and in general ought to be subject to a lien for materials furnished or supplied to a contractor to be used in the construction of a building *when actually used*."

If he is right, the lien would not arise until actual user, and the time for registration might then be entirely gone. Nor

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could a lien for material be registered as provided, during the furnishing, if it did not arise till the supplies were built into the structure.

Then again, the owner is bound to retain 20 per cent. of the value of the material furnished, on the basis of the contract price or its actual value, a provision which is shorn of much of its usefulness if limited to the material supplied only by the contractor himself and not by sub-contractors.

As I do not think that the views expressed in the *Brooks-Sanford* case were the basis of the judgment or were necessary to its decision, I think the Court should lean to the view that the statute is wide enough to cover the case in hand, and that any other construction would result in the greatest confusion in registering and realising the liens of material-men.

I think the appeal should be dismissed with costs.

*Appeal dismissed.*

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July 12.

[APPELLATE DIVISION.]

DELDO V. GOUGH SELLERS INVESTMENTS LIMITED.

*Mechanics' Liens—Claim of Material-men—Registration—Time—Extent of Lien—Amount "justly Owing" by Owner to Contractor—Sum Payable to Contractor—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 6, 10—Construction of Building Contract—Price Payable in Allotted Portions—Entire Completion of Work not a Condition Precedent to Payment—Deduction by Reason of Non-completion of whole Contract.*

It was *held*, upon the evidence, that the claimants' lien for material supplied to the contractor for a building was registered in time and was established, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

The contract between the owner and the contractor provided that the building should be erected for \$3,850, and completed in two months from the date of starting; that the work and material should be "paid for 80 per cent. as work proceeds, and the builder allowed five draws—\$300 on completion of stone work, and then \$400 when roof is on, \$1,600 when plastering is all finished, and \$700 when complete, and balance within 30 days." The stone work having been completed, and the owner having paid the contractor \$100 as an advance, the claimants contended that, as against the owner, their rights were not limited to the 20 per cent. drawback on the value of the work done, but included the balance of \$200 due to the contractor in respect of the stone work:—

*Held*, that, under the Act, secs. 6 and 10, the rights of lien-holders are measured by the amount "justly owing" by the owner to the contractor, and the owner is not liable for a greater sum than is payable to the contractor.

2. That the contract did not make entire completion a condition precedent to payment, but expressly divided the contract price into five sums, one of which had become "payable" under the terms of the contract. The amount payable or justly due was, *prima facie*, \$200—subject to any deduction which the owner could establish by reason of the non-completion of the whole contract—for it contemplated entire performance, although providing for payment in advance of the time of completion.

*Terry v. Duntze* (1795), 2 H. Bl. 389, applied.

*Sherlock v. Poicell* (1899), 26 A.R. 407, distinguished and head-note corrected.

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APPEAL by the Builders and Contractors Supplies Limited, claimants, from the judgment of Mr. F. J. Roche, an Official Referee, dismissing the appellants' claim to enforce a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, for material supplied by the appellants for a building erected by the defendant Morris, contractor, for the defendant Lembke, owner.

The contract between the owner and the contractor provided for the building of two houses for \$3,850; that the building should be completed in two months from the date of starting; that all work and material should be paid for "80 per cent. as work proceeds, and the builder allowed five draws—\$300 on completion of stone work, and then \$400 when roof is on, \$1,600 when plastering is all finished, and \$700 when complete, and balance within 30 days, upon shewing all receipts paid and work satisfactory."

It was admitted that the stone work was completed and that \$100 was paid to the contractor on account, leaving \$200 due upon this head. The appellants claimed to enforce their lien as against the owner to the extent of the \$200 thus due as well as of the 20 per cent. drawback.

May 4. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. Proudfoot, K.C., and W. H. Grant, for the appellants, argued that their lien was filed in time, and that they could claim not only against the 20 per cent. drawback on the value of the work done, but also against the \$200 to which the contractor became entitled upon the completion of the stone work; they cited *Wood v. Stringer* (1890), 20 O.R. 148, and *Collins Bay Rafting and Forwarding Co. v. New York and Ottawa R.W. Co.* (1902), 32 S.C.R. 216. The \$200 became payable as soon as the stone

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work was finished; and it was "justly owing" (sec. 6 of the Act), and so subject to the claim of the lien-holders.

*W. R. Cavell*, for the defendant Lembke, respondent, contended that the contract was indivisible; and that, as it had not been wholly completed according to its terms, the appellants were not entitled to claim in respect of the \$200. Completion was a condition precedent to the right to payment: *Sherlock v. Powell* (1899), 26 A.R. 407; *Simpson v. Rubeck* (1911), 3 O.W.N. 577; *Cole v. Smith* (1909), 13 O.W.R. 774; *Rice v. Sockett* (1912), 27 O.L.R. 410; *Brooks v. Mundy* (1914), 5 O.W.N. 795.

July 12. The judgment of the Court was delivered by HODGINS, J.A.:—On the argument it seemed clear that the lien of the claimants, who are material-men, was filed in time. They were entitled to register it within 30 days from the last delivery of material, and from their account it appears that over 90 per cent. of their material was supplied on the 15th July. This coincides with the evidence as to the duration of the work. The result is that the claimants' lien is established.

The remaining question is, to what amount this lien entitled them as against the owner.

The contract between the owner and the contractor Morris is dated the 22nd June, 1914. It provides for the building of a pair of solid brick houses for \$3,850—"the same to be completed in two months from the date of starting." Then follow specifications as to material and quality, winding up with this clause: "All work and material to be first class, the same to be paid for 80 per cent. as work proceeds, and the builder allowed five draws—\$300 on completion of stone work, and then \$400 when roof is on, \$1,600 when plastering is all finished, and \$700 when complete, and balance within 30 days, upon shewing all receipts paid and work satisfactory."

The owner in his evidence admits that the stone work is completed and that \$100 was paid, apparently as an advance to the contractor, on the 27th June, 1914. The claimants now contend that their rights are not limited to the 20 per cent. drawback on the value of the work done, but include this balance of \$200 to which the contractor became entitled under the contract upon the finishing of the stone work.

Under the Mechanics and Wage-Earners Lien Act, and apart from the 20 per cent. drawback, the rights of lien-holders are measured by the amount "justly owing" by the owner to the contractor, and the owner is not liable for a greater sum than is payable to the contractor.\*

The contract here does not make entire completion a condition precedent to payment, but expressly divides the \$3,850, the consideration, into five sums, one of which has become "payable" under the terms of the contract.

In *Terry v. Duntze* (1795), 2 H. Bl. 389, Buller, J., said (pp. 392-3): "It is a rule long established in the construction of covenants, that if any money is to be paid before the thing is done, the covenants are mutual and independent. . . . The plaintiffs covenant to finish and complete the buildings on or before the 29th of September then next: in consideration of which the defendant covenants to pay £3,800 by instalments, viz., a certain sum when the second floor should be laid, a further sum when the . . . By the terms of the contract then two several sums of money were to be paid, before the thing to be done was done. The plaintiffs, therefore, were clearly entitled to their action for the money without averring performance, and the defendant to his remedy on the covenants."

In that case the action was not for the instalments, as stated in *Hudson on Building Contracts*,† but for the whole price, and the defence was non-completion within the stipulated time, but the rule of construction laid down is applicable to this case. It was adopted in *Government of Newfoundland v. Newfoundland R.W. Co.* (1888), 13 App. Cas. 199, and acted on in *Workman Clark & Co. Limited v. Lloyd Brazileño*, [1908] 1 K.B. 968.

The amount payable or justly due is, *primâ facie*, \$200, and this is, of course, subject to any deduction which the owner can establish by reason of the non-completion of the whole contract,

\*By sec. 6 of the Act (R.S.O. 1914, ch. 140), the lien is "limited . . . in amount to the sum justly due to the person entitled to the lien and to the sum justly owing . . . by the owner." By sec. 10, "the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor."

†4th ed., pp. 258, 279, 310, 316.

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for it contemplates entire performance, although providing for payment in advance of that time.

The head-note in the case of *Sherlock v. Powell*, 26 A.R. 407, cited on the argument, is somewhat misleading. That case does not deal at all with the right to recover instalments of the price. The instalments of 80 per cent. provided for in the contract had all been paid, and Lister, J.A., states the point of the case thus (p. 408): "The question is, whether the plaintiff is entitled under the circumstances" (i.e., not having completed the work), "to recover the balance of the contract price or any portion of it." He then adds: "Manifestly, performance is a condition precedent to the right of the plaintiff to enforce payment of the balance of the contract price."

This statement is based upon the fact that the balance was payable only after completion and upon acceptance of the work.

The judgment of the Official Referee should be reversed, and the appellants declared entitled to a lien. The amount payable will be the \$200, subject to the owner's right to shew that, by reason of non-completion or otherwise, it is not justly due and owing, or to reduce it. Other lien-holders will be entitled to share if their rights are affected by this judgment. The Referee must ascertain the value of the work done so as to calculate the 20 per cent. drawback. The appellants may add their costs to their lien, subject to the provisions of the Mechanics' and Wage-Earners Lien Act as to the percentage of costs recoverable.

*Appeal allowed.*

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April 9.  
July 12.

[APPELLATE DIVISION.]

RE WOOD VALLANCE & Co.

*Partnership—Death of Partner—Construction of Partnership Articles—Implication of Term—Right of Pre-emption of Surviving Partner—Inclusion of Goodwill as Asset—Annual Statements of Account—Right of Representatives of Deceased Partner to Share in Profits after End of Current Year.*

In the absence of an express agreement, surviving partners have no right to take the share of a deceased partner at a valuation, nor have they any right of pre-emption.

The Court has no right to imply a stipulation in a written contract, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.

*Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488, 491, followed.

The goodwill of a trade, although inseparable from the business, is an appreciable part of the assets of a concern; a share of it belongs to the estate of the deceased partner; and it is saleable and divisible on dissolution or on the death of a partner.

*Wedderburn v. Wedderburn* (1855), 22 Beav. 84, and *Hibben v. Collister* (1900), 30 S.C.R. 459, followed.

By articles of partnership dated the 31st January, 1910, a partnership between W. and V. as hardware merchants was agreed upon. The term was 5 years; but during the term, on the 28th November, 1913, V. died. The articles provided, *inter alia*, that, at the expiration of each year of the partnership, an account should be taken of the stock in trade, assets, and liabilities, and an annual balance-sheet made out to the 31st January, which should be attested by each of the partners; that, in the event of the death of a partner during the term, the partnership should not be dissolved or wound up, but should be continued by the survivor until the 31st January following the date of the death, or, at the option of the surviving partner, during a period not exceeding 12 months from the death; that the surviving partner should not be required to pay to the representatives of the deceased any portion of his capital in the partnership until the expiration of 12 months from the death; that the capital of the deceased partner should in the meantime remain in the business and bear interest at the rate of 6 per cent. per annum to the date of payment, and the persons interested in such capital should receive the same share of the profits for the period mentioned as would be paid to the deceased partner if living; and that, should any dispute arise between the partners or between the surviving partner and the representatives of the deceased partner as to the amount with which either partner was entitled to be credited or liable to be charged, in making up any annual balance-sheet of the partnership, or as to the valuation of any assets of the partnership, such dispute should be referred to an arbitrator. There was no express stipulation that the surviving partner should be entitled to take over the interest of the deceased partner in the partnership assets, upon paying to his estate the amount of his capital with interest and profits:—

*Held*, that, upon the proper construction of the articles, such a term was not to be implied, and that there was no right of pre-emption in the surviving partner.

(2) That the goodwill formed part of the ordinary assets of the firm.

(3) That the annual statements of account and the valuation therein placed upon the assets should be regarded as merely conventional in their nature, and upon the final winding-up should be disregarded.

(4) That the representatives of V. were not entitled to any share of the profits accruing between the end of the then current year and the period fixed for the final winding-up.

Judgment of MIDDLETON, J., varied.

MOTION by the executors of the late William Vallance, upon originating notice, for an order determining certain questions arising upon the articles of partnership, dated the 31st January, 1910, between W. A. Wood and William Vallance.

March 22. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*E. F. B. Johnston*, K.C., for the applicants.

*W. N. Tilley*, for W. A. Wood, the surviving partner.

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April 9. MIDDLETON, J.:—This is an originating notice for the purpose of determining certain questions arising upon the articles of partnership dated the 31st January, 1910. The difficulties relate to the rights of the surviving partner under the articles.

Mr. Vallance died on the 28th day of November, 1913. The last balance-sheet taken under the articles was on the 31st January, 1913. The partnership provided for by the articles was for a period of five years commencing on the 31st January, 1910—this being a partnership to continue a business that had been carried on for very many years, and which had come to an end by reason of the death of one of the members of the firm. The articles are short, and the material provisions are as follows:—

“2. The capital of said copartnership shall consist of stock in trade, book-debts, promissory notes, bills of exchange, securities, and other assets of the former firm of Wood Vallance & Co., as the same stands at this date, and the parties hereto hereby assign and transfer to the said new firm of Wood Vallance & Co. all their interests in the said stock in trade, book-debts, and other assets heretofore standing in the name of the former firm of Wood Vallance & Co.”

“4. The parties hereto are hereby declared to be interested in the capital and assets of the said firm to the amounts following, namely: the said William Vallance the sum of \$479,243.43; the said William A. Wood the sum of \$577,524.21.”

Clause 5 provides for the allowance of interest at 6 per cent. upon the capital to the credit of each partner.

Clause 6 provides for the profits, after payment of interest, being equally divided.

Clause 7 provides that each partner shall devote his whole time to the business.

Clause 8: “At the expiration of each succeeding year of the partnership, an account shall be taken of the stock in trade, assets, and liabilities of the partnership, and an annual balance-sheet shall then be made out to the 31st January in each year, which shall be attested by each of the parties hereto.”

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Clause 9: "In the event of the death of any partner before the expiration of the term of these articles of partnership, the copartnership hereby created shall not be thereby dissolved or wound up; but shall be continued by the survivor during the current or financial year, that is, until the 31st January following the date at which the death of any partner occurs, or, at the option of the surviving partner, during a period not exceeding 12 months from the date of the death of any deceased partner. The surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital in the partnership until the expiration of 12 months from the decease of such partner. The capital of any deceased partner shall in the meantime remain in the business and shall bear interest at the rate of 6 per cent. per annum to the date of payment, and the person or persons interested in such capital shall also receive the same share of the profits of the business up to the end of the current or financial year, that is, until the 31st January following the date at which the death of such partner occurs, as would be paid to such partner so dying as aforesaid, if he were still living."

Clause 10: "Should any dispute or difference arise between the said partners or between the surviving partner and the representatives of any deceased partner as to the amount which either partner is entitled to be credited with, or liable to be charged with, in making up any annual balance-sheet of the copartnership, or as to the valuation of any of the assets of the copartnership, such dispute shall be referred to an arbitrator mutually chosen by the parties, or, in the event of their failing to agree upon an arbitrator, then to such arbitrator as a Judge of the High Court shall, upon application of either of the parties on one week's notice in writing to the other, appoint, and the award or decision in writing of the arbitrator so chosen or appointed shall be binding upon all parties interested."

It is obvious that the difficulty in determining the rights of the parties under these articles arises from the paucity of the provisions found therein. The case is a good illustration of what is said by Sir Frederick Pollock in the preface to volume

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146 of the Revised Reports: "Half the trouble of legal interpretation arises from the Courts being driven to construe not what the parties have said but what they have omitted."

The principle guiding in all attempts to imply terms in a written agreement was investigated by me to the best of my ability in the case of *Hopkins v. Jannison* (1914), 30 O.L.R. 305, where, at pp. 319 *et seq.*, I collected the cases which establish and illustrate the principle. The Court must at all times avoid making a contract for the parties which they have not themselves made; but, on the other hand, all terms must be implied which are necessary to give to the transaction that effect which the parties must have intended it to have had, gathering the intention from that which is found in the document itself.

The first and main question asked upon this motion is, whether the surviving partner is entitled to take over the interest of the deceased partner in the partnership assets, upon paying to his estate the amount of his capital with interest and profits.

The articles make no such express stipulation, but from what they do contain I think that this right must be implied. By clause 9, it is first provided that upon the death of the partner the partnership shall not be dissolved, but shall be continued by the surviving partner, either during the current financial year, or, at his option, for a period not exceeding 12 months from the date of the death, the capital of the deceased partner in the meantime remaining in the business and bearing interest at the rate of 6 per cent. per annum to the date of payment; and, in addition, the estate of the deceased partner shall receive its appropriate share of profits up to the end of the current financial year. There is imbedded in this clause the significant provision that the surviving partner shall not be required to pay to the representative of the deceased partner any portion of his capital until the expiration of 12 months from his death.

Clause 10 is, however, the one that appears to me to point conclusively to the taking over by the surviving partner of the entire business, for it provides that, if any dispute or difficulty arises between the surviving partner and the representatives of

the deceased partner as to the valuation of the assets, the dispute is to be referred to arbitration. This would be absolutely meaningless if the valuation was not required to determine some real question, and the only question can be the price to be paid by the surviving partner to the representatives of the deceased partner.

As subsidiary to this, the question is asked: when does the right of the representatives of the deceased partner to share in the profits end? I think that the articles expressly provide that the right to share in the profits ends on the 31st January following the date of death, and that this is so whether the option given to the surviving partner to continue the business as a partnership for 12 months from the death is exercised or not. After the 31st January, the representatives of the deceased partner receive interest upon the capital, and that only.

The next question is, whether the goodwill of the business is to be taken into account in ascertaining the amount to be paid. I think that it is not. The capital of the firm consists of the assets set out in clause 2 and does not include anything allowed for goodwill. The balance-sheets, I think, follow the intention of the partnership agreement, and no mention is made in them of goodwill. What is to be repaid is, I think, "capital" in the sense in which that word is used in the articles and the balance-sheets. It represents the share of the partner in the value of the assets, as ascertained by the balance-sheets, over the liabilities there shewn. It is quite true that, if the articles of partnership make no provision, goodwill is an asset of the firm, and the goodwill must be realised for the benefit of all; but it is quite clear that, where the articles provide that the surviving partner is to pay the representatives of the deceased partner upon the footing of the balance-sheets, goodwill is not included. *Wedderburn v. Wedderburn* (1855), 22 Beav. 84, is authority for the general proposition. *Steuart v. Gladstone* (1879), 10 Ch.D. 626, is an authority for the exclusion of the value of the goodwill in a case such as this. *Scott v. Scott* (1903), 89 L.T.R. 582, is to the same effect.

*Hibben v. Collister* (1900), 30 S.C.R. 459, is not in conflict

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with this principle, for there the articles did not provide for an adjustment of the rights of the parties according to former annual accounts, but directed a valuation of all the assets of the partnership after the death.

The next question is, whether, on the valuation for the purpose of ascertaining the share of the deceased partner, the balance-sheets of the 31st January, 1913, are binding, or whether the actual value of the assets is now to be ascertained.

The 8th clause, above quoted, providing for the preparation of the annual balance-sheets, requires attestation so as to shew the assent of both parties thereto; but the 10th clause indicates that the balance-sheet to be prepared is not a mere book-keeping balance, but a balance to be based on the value of the assets; for it is there provided that, if any dispute arises, in the making up of the annual balance-sheet, as to the valuation of any of the assets of the partnership, the dispute shall be referred to arbitration; so that, I think, it must be taken that the balance-sheet determines the valuation of the partnership assets as of its date. This will not prevent any correction or re-adjustment of the value if, on the making of the balance-sheet of the 31st January, 1914, it is shewn that, by reason of anything that has happened, the true value is not given in the earlier statement. For example, one of the items of assets represents the indebtedness of customers to the firm; a customer whose debt may have been included as being worth 100 cents on the dollar may have become in the meantime insolvent; the asset is not to be continued at the 100 cents, but at its true value. Or, taking another example, a machine may have been carried in stock at its cost; the progress of invention may have demonstrated that it is now of little value; it should be treated accordingly. On the other hand, where real estate is valued, the valuation, being largely a matter of opinion, should not be changed unless the course of events in the year points to a change.

This, I think, covers all that was argued before me, and answers to the questions submitted can be framed accordingly.

The costs of both parties may be paid out of the partnership assets.

The executors of William Vallance, deceased, appealed from the order of MIDDLETON, J.

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April 27. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*E. F. B. Johnston*, K.C., for the appellants, argued that the respondent, the surviving partner, had no absolute right under the articles of partnership to take over the deceased partner's interest in the business, but merely an option under which he was entitled to carry on the business for a period not exceeding one year from the death of the deceased partner. The clause providing that any dispute as to the value of an asset might be referred to arbitration does not affect the main issue as to the existence of a right to pre-emption in the surviving partner. The goodwill formed part of the assets of the firm, and should be taken into account as such: *Foster v. Mitchell* (1911), 3 O.W.N. 425, 20 O.W.R. 754; affirmed, with a variation on a minor point (1912), 3 O.W.N. 1509, 22 O.W.R. 571; *Stewart v. Gladstone*, 10 Ch.D. 626; *Smith v. Everett* (1859), 27 Beav. 446. See Halsbury's Laws of England, vol. 22, para. 215. The appellants are entitled to their share of the profits in lieu of interest after the 28th November, 1914; but, as the option was not exercised, the partnership ended on the 31st January, 1914.

*S. F. Washington*, K.C., and *W. N. Tilley*, for the respondent, argued that under the articles the surviving partner was entitled to purchase the assets of the firm as shewn on the last balance-sheet before the death of the deceased partner, together with accrued profits and interest. On the question of goodwill, they referred to *Hunter v. Dowling*, [1895] 2 Ch. 223; and on the question of the conclusive nature of the annual statements of account, reference was made to *Coventry v. Barclay* (1863-4), 33 Beav. 1, 3 DeG. J. & S. 320, cited in Lindley on Partnership, 8th ed., p. 484.

July 12. GARROW, J.A.:—Appeal from the judgment of Middleton, J., under an originating notice, upon the construction of articles of partnership dated the 31st January, 1910, made between William A. Wood and William Vallance, con-



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stituting the partnership of Wood Vallance & Co., carrying on business at the city of Hamilton as hardware merchants. The partnership term agreed upon in the articles was for 5 years, but during the term, namely, on the 28th November, 1913, William Vallance died. The articles contain several special clauses applicable to such a case, and it is entirely upon the proper construction of these that the present contention has arisen. These clauses (with others) all, I think, sufficiently appear in the judgment, for which reason I do not repeat them.

The questions discussed in the judgment, and again before us, briefly restated, are: (1) the claim of the surviving partner to a right to take the assets at a valuation; (2) his claim to the goodwill; (3) the binding efficacy upon the question of the value of the assets of the annual statements; and (4) the division of the profits between the end of the then current year and the period fixed for the final winding-up.

As will be seen, Middleton, J., was of the opinion: (1) that, while the articles contain no express agreement giving a right of pre-emption to the surviving partner, such an agreement should under the circumstances be implied; (2) that the value of the goodwill should not be taken into account as an asset; (3) in effect, that the values set out in the annual statements are binding upon both parties; and (4) that the profits accruing after the end of the current year belong exclusively to the surviving partner.

It is, I think, obvious that the dominating feature of the judgment is the finding first mentioned, namely, that under an implied term to that effect the surviving partner is entitled to take over the partnership assets at a valuation.

Equality, that favoured child of equity, is the rule. If inequality is claimed, it must be justified in terms that there can be no reasonable doubt about. An author of authority says: "In the absence of an express agreement to that effect, the surviving partners have no right to take the share of a deceased partner at a valuation; nor to have it ascertained in any other manner than by a conversion of the partnership assets into money by a sale; nor have they any right of pre-emption:" see Lindley on Partnership, 8th ed. (1912), p. 694. And at the

same page the learned author states his view of the law upon the other main question of a partner's right to the goodwill: "Even the goodwill of the business, if saleable, must be sold for the benefit of the estate of the deceased; although the surviving partners are under no obligation to retire from business themselves, and cannot, it seems, be prevented from recommencing business together in the name of the old firm unless the goodwill has been or is to be sold."

And, in the absence of an agreement such as the one implied, the value and effect of the annual statements as accounts stated would also be materially altered. In that case all the assets, however previously valued, would, in the ordinary course of winding-up, be realised in cash by sale in the usual way, and each would be entitled to share in the proceeds without reference to these annual statements.

The implied term, it will thus be seen, is of very wide, even revolutionary, extent, and would, it appears to me, require for its justification something very compelling in the other words of the agreement from which the inference must be drawn, something in fact which does not simply create a question or justify a guess, but which in the interest of justice enables not merely an inference but the correct inference to be surely drawn.

In the present instance, should it be inferred that what was intended was merely an option to the surviving partner to purchase? Or was he to be bound to purchase? And, if the latter, one should also be able further to infer a contract in the nature of a covenant by the surviving partner to do so, upon breach of which an action against him could be maintained.

There are now many cases upon the subject of implied terms. Many of them are referred to in the judgment of Middleton, J., in *Hopkins v. Jannison*, 30 O.L.R. 305. I do not propose to pass them again in review here, or indeed to say more about them than that I have always considered that the essence of such cases is well expressed by Lord Esher in *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488, at p. 491, where he says: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable

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and business manner, an implication *necessarily* arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." And, within this exposition of the rule, I am, with deference, quite unable to see anything in the articles in question which would justify implying the term now under consideration. It is not, it seems to me, a necessary implication at all. All that the articles as they stand provide for can be wrought out to a fair, definite, and final conclusion without the aid of the implied term. Its effect is simply to give rights which *primâ facie* the agreement as it stands, without the term, does not give.

In his judgment Middleton, J., refers to clauses 9 and 10 of the articles as those which induced him to reach a conclusion favourable to the implication. Clause 9 in its structure seems to me to be upon the whole inconsistent with the idea now put forward that, in effect, at once upon the death of the partner, the business, goodwill, etc., passed to the survivor, to be paid for by him upon a valuation, at the time and in the manner mentioned in the clause.

It expressly says that the partnership is not to be dissolved by the death, but shall continue for at least the term of the then current year, or, at the option of the survivor, for a year from the death.

I am inclined to think that the chief, if not the sole, object of the clause was intended to be in ease of the surviving partner so that he might not be harassed or hurried in the operation of winding-up, which upon the death of the copartner would necessarily devolve upon him. But, whatever else may be extracted from the clause, it does not, I think, aid in any certain degree toward justifying the implication.

Reliance, however, was chiefly rested upon clause 10, which provides for an arbitration in case of a dispute between the surviving partner and the representatives of a deceased partner, as to the valuation of the assets of the firm. This, the learned Judge considered, would be absolutely meaningless without the implication. That the clause would otherwise be meaningless

is not in itself, I think, a sufficient ground for making such an important implication. But it is not, I think, meaningless, if it is borne in mind that the partnership might, by the terms of the agreement, be continued, at the option of the surviving partner, beyond the end of the then current year, in which case it would be his duty at the end of the then current year to make up the statement of the stock in trade, assets, and liabilities of the firm required by clause 8, upon which the interest payable under the provisions of clause 9 would be calculated.

And it is quite conceivable that the values placed thereon by the surviving partner might be disputed by the representatives of the deceased partner, in which case the arbitration provided for by clause 10 could be invoked.

We were referred to several cases upon the argument, at which I have of course looked. But, as has often been said, cases upon the construction of documents are seldom of use in construing other documents in other cases. Each case must depend upon its own particular facts and circumstances. For instance, *Steuart v. Gladstone*, 10 Ch.D. 626, was cited and is also referred to in the judgment as an authority for the proposition that the value of the goodwill is to be excluded in such a case as this. But that is not there laid down as a general proposition, but simply as the proper conclusion to be drawn in that case from the terms of the agreement between the parties, which in no way resembled the very much simpler case with which we are dealing. There the agreement contemplated a partnership comprising several partners, and contained provisions for a partner dropping out, or even being forced out, as the plaintiff was by his copartners; the business continuing. Here the partnership is quite at an end, and the only real question is as to the proper division of the assets.

I am, for these reasons, of the opinion that the proper construction of the articles is that there is no right of pre-emption in the surviving partner; that the goodwill forms part of the ordinary assets of the firm; and that, although this seems so obviously to follow that it need scarcely be mentioned, the annual statements of account and the valuation therein placed upon

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the properties and assets should be regarded as merely conventional in their nature, and upon the final winding-up are really of no importance and should be disregarded.

The remaining question is as to the profits after the end of the then current year; and as to this I, not entirely without hesitation, agree with the conclusion of Middleton, J., who held that the representatives of the deceased partner were not entitled to any share therein. It is true, as was contended, that the partnership is in express terms declared not to be dissolved by the death, and that the partnership capital is to remain in the business for a year thereafter, at the option of the surviving partner. But the parties seem to have made an express agreement upon the subject of the profits, by the terms of which the representatives of the deceased partner are to share in such profits only until the end of the then current year.

Under the circumstances, the maxim *expressio unius est exclusio alterius* seems to me to apply to prevent an extension of this express provision in the manner contended for by the learned counsel for the representatives of the deceased partner. By the articles both partners were bound to give their undivided attention to the business (clause 7): The death of Mr. Vallance made this of course impossible, thereby casting extra labour and responsibility upon the surviving partner; and it may very well have been considered only fair, as he was alone doing the work, that he alone should take the profits after the end of the then current year.

To the extent indicated above, I would allow the appeal, and I think it should be with costs.

HODGINS, J.A.:—The firm of Wood Vallance & Co. is the successor of a business which began in 1849, and which has been carried on under that name since 1889. The balance-sheet of the firm existing in 1910 shews two Vallances and two Woods as interested therein. It is entirely probable that the goodwill of the business was valuable, but it is not mentioned by name in the present partnership articles, probably because the main family interests remained, and the business was being "continued," as it is expressed in the articles. But there is appar-

ently some goodwill existing and attached to the business of the present firm, otherwise one of the questions now in issue would not have arisen. That goodwill passes under the word "assets" is clear: see *Jennings v. Jennings*, [1898] 1 Ch. 378, and *Inland Revenue Commissioners v. Muller & Co.'s Margarine Limited*, [1901] A.C. 217; *In re Leas Hotel Co.*, [1902] 1 Ch. 332; *Foster v. Mitchell*, 20 O.W.R. 754, 22 O.W.R. 571, 3 O.W.N. 425, 1509. That is the word used to describe the property of the former firm other than that specially enumerated, and the capital of the present firm.

This being the case, the appellants are entitled to have the partnership agreement construed as if it specifically mentioned goodwill as an asset both taken over and as forming part of the capital, unless the other provisions of the agreement forbid it.

The explanation of what goodwill is and why partners have an interest in it is nowhere better given than in *Wedderburn v. Wedderburn*, 22 Beav. 84, 104: "The goodwill of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a Court of Equity. Accordingly, in reported cases, Lord Eldon held, that a share of it properly and as of right belonged to the estate of the deceased partner. It does not survive to the remaining partners, unless by express agreement; but it may by agreement, as it may be agreed that any particular portion of the partnership assets shall so survive. Goodwill manifestly forms a portion of the subject-matter which produces profits, which constitutes partnership property, and which is to be divided between the surviving partners and the estate of the deceased partner, according to the terms of the contract, and when that is silent, according to their shares in the concern."

The cases are also decisive that, being an asset, it is saleable and divisible on dissolution or on the death of a partner: *Hibben v. Collister*, 30 S.C.R. 459; *Banks v. Gibson* (1865), 34 Beav. 566; *Hill v. Fearis*, [1905] 1 Ch. 466.

The balance-sheets produced do not shew goodwill as an asset; probably because it is not a proper item in those of a going concern: *Steuart v. Gladstone*, 10 Ch.D. 626; *Hill v.*

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*Fearis, supra.* But it is argued that, if in general goodwill must be accounted for, the terms of the present agreement negative that rule.

The order appealed from construes the partnership agreement, so far as it deals with the situation created by the death of the late Mr. Vallance, and in effect holds it to have provided for a sale to the surviving partner on the footing of the balance-sheet compiled previous to his death. Ordinarily the death of a partner terminates the partnership, and the survivor is bound to wind it up: *Whitney v. Small* (1914), 31 O.L.R. 191. Under the present articles it is provided that this result is not at once to happen; and the real question is, whether there is merely a postponement of the ordinary rights arising on dissolution by death, or whether the agreement provides for another and different way of ascertaining the rights of both parties.

In dealing with this it is well to keep in mind the statement of Lord Esher, M.R., in *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. at p. 491, as to when and how terms not expressed in a contract may be implied. This statement is as follows: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

I have found no case save *In re David and Matthews*, [1899] 1 Ch. 378, in which an agreement for sale has been implied; and, from an examination of the other reports, 80 L.T.R. 75, 68 L.J. Ch. 185, 47 W.R. 313, I should judge that the case proceeded upon the assumption that the intention was that the surviving partner had the right to buy, and that Romer, J., was not intending to do more than determine what was the effect of the words of the agreement, having regard to that assumption.

Dealing then with the agreement as it stands, these features appear. The copartnership is not by the death "thereby dis-

solved or wound up." It is to be "continued by the survivor during the current or financial year, that is, until the 31st January" following the date of death; "or, at the option of the surviving partner, during a period not exceeding 12 months from the date" of death.

This plainly means a postponement of the usual consequences of the death of a partner until a definite period which may be prolonged by the survivor, and a carrying on of the partnership as such in the meantime. At the end of this term the dissolution and winding-up must take place unless there is something in the agreement which provides differently. This construction would be beyond question if the continuation were only to the end of the then financial year, and the added option only gives a right to further postpone dissolution and winding-up.

The agreement then deals with the capital of the deceased partner. If the partnership is continued, his capital would necessarily remain in the business, and the articles so provide. From what was stated at the bar, the practice of both parties was to draw on their capital when they desired, and Mr. Wood in his depositions says that he has continued to do so. As to the capital of the deceased partner so remaining, there are two provisions. One is that it shall earn profits only till the end of the financial year, but thereafter only interest at 6 per cent. It is urged that this deprivation of profits is inconsistent with the idea that the partnership is continuing because in that case the capital would not be deprived of the profits accruing by its use. On the other hand, this is a very natural provision if the surviving partner has to bear the burden of carrying on the business, and compensates him for that burden. It is not conclusive either way, and it is rather a slender provision on which to hang an option or a right to buy out the deceased partner's interest upon the basis of a balance-sheet made out during the previous year, when it was a going concern. The learned Judge whose order is appealed from does not treat this as decisive, though he expresses the opinion that the provision is significant. The expression "shall not be required to pay . . . any portion of . . . capital" is, to my mind, an expression at variance with the idea of a sale to the surviving partner, if it is limited to the

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capital shewn in the yearly balance-sheets, having regard to the composition of those sheets and the provisions of article 10. As will be seen, the capital in the balance-sheets represents apparently the difference between assets and liabilities, most of which would not be realisable until the affairs were wound up. So that the provision is a reasonable one to protect the assets against too hasty liquidation.

If the surviving partner bought out the deceased partner's share, then both capital and profits would have to be paid unless a sale price were arrived at, in which case it would not be capital but purchase-money. But the word "pay" may fairly be used of the return of capital by the surviving partner, as he, strictly speaking, becomes liable to account on realisation. In *McClellan v. Kennard* (1874), L.R. 9 Ch. 336, 346, his position is thus defined: "The general rule is, that the interest which the testator had in a *chose in action* jointly with another shall not pass to his executor, yet *per legem mercatoriam*, as formerly mentioned, an exception was established in favour of merchants, which has been extended to all traders and persons engaged in joint undertakings in the nature of trade. But in these cases, although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased."

Clause 10, however, is regarded as conclusive.

It deals with disputes or differences both between the partners while living and between the surviving partner and the representatives of the deceased partner. These disputes, it states, are as to (1) the amount which either partner is entitled to be credited with or liable to be charged with in making up any annual balance-sheet of the copartnership, or (2) as to the valuation of any of the assets of the copartnership.

It had been agreed by clause 8 that annual balance-sheets should be made out "at the expiration of each succeeding year of the partnership," which in its terms includes the current financial year during which the partnership is being continued

under article 9, but not thereafter, for the continuance at the option of the surviving partner is not for a year, but only until 12 months after the death, which forms a broken period. The balance-sheets were to be "attested by each of the parties thereto," which may well include the representatives of the deceased partner, in view of the fact that, the partnership not being dissolved, the appellants might at all events fairly be treated as partners for this purpose.

The copies of the balance-sheets for 1911, 1912, 1913, do not shew any attestation by the parties. But the originals may do so. However, the balance-sheet to the end of January, 1914, is not so verified. Article 10, I think, can be read as having a useful meaning during the partnership, when the balance-sheets were being made up, and equally so after the death, when the balance-sheet to the end of the then financial year had to be made up, and this can be tested by examining the results when the form of the balance-sheets is considered in connection with the provisions of the partnership articles. In that made up to the 31st January, 1914, the real estate is stated at \$100,000. It is said to be worth much more. If the capital of each partner is determined by the proportions stated in the agreement (article 4), subject to the amounts drawn out, the increase in any asset, being divisible in unequal fractions, would be of importance not only with regard to the amount on which interest is to be paid for the period subsequent to the 31st January, 1914, but also to the interest payable during that year, under article 5. Then, if an asset is increased, there would necessarily be an increase in actual capital of the partners as shewn in the balance-sheet, because the capital items appear to be put in at an amount to balance it. So that the purpose of article 10 may be very important, even if restricted to a question of the valuation of any asset, the winding-up division being naturally based upon the figures settled by the arbitration.

But it is not clear to my mind that the proportions stated in article 4 determine for all time the proportions in which the assets are to be owned, and the question should be viewed in the alternative aspect. In the balance-sheets the capital of each

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partner is stated in varying figures. How these figures are arrived at is not shewn, though, if drawings on capital account only were deducted, the amounts shewn year by year would represent the original capital amounts less those drawings. Yet these sums may include added profits. If the position is correct that they are the actual capital of each partner in the strict sense of money capital put in, then, upon winding-up, these amounts would be paid out before dividing the surplus, which is divisible in a different proportion. This ultimate surplus would be profits, and the articles provide for its equal division (article 6).

In this view, too, the real value of the assets would be important, as, after discharging the liabilities and repaying the capital, the larger the surplus the more each partner would be entitled to, and it would provide a standard of accountability to which the surviving partner would, *primâ facie*, be bound to conform. Hence, whether the original proportions governed the division of capital, or the ultimate surplus is to be divided equally, I see a good reason why article 10 would be of importance to each partner, and to the surviving partner, and to the representatives of the deceased partner.

If I am correct, then the question of the goodwill of the business settles itself, because, if an asset, it is saleable and divisible as part of the surplus which I assume will exist. The capital of each partner in the articles of agreement is stated at the exact sum which appears in the balance-sheet of the previous firm dated the 31st January, 1910, while in 1911 the capital amounts appear in altered figures and as balancing items, and similarly in the other balance-sheets.

In the 1914 balance-sheet, the assets had decreased by \$98,008.81, while the liabilities decreased by \$151,786.44, thereby shewing an increase of \$53,777.63 in the partners' capital accounts, i.e., of \$37,824.78 in the one and \$15,952.85 in the other. This shews that the figures of capital represented balancing items and that the proportions given originally in article 4 were not adhered to.

This treatment of capital as being the surplus in the business,

depending on a deduction of liabilities from assets, indicates the importance of shewing in the balance-sheet of the 31st January, 1914, the true values of the various assets. For, even if the sale to the surviving partner was provided for, as the learned Judge below has held, then the amount on which interest is to be calculated and the amount of capital repayable might be considerably increased by the item of real estate alone, even if goodwill were not included.

I am unable to see why the surviving partner should be allowed to take over the assets at less than their real value, because they so appear in a former balance-sheet, unless that right is expressly given to him under the articles. The Court should not imply an agreement so unreasonably favouring one of the parties unless compelled to do so by force of the other terms of the agreement. The case of *Steuart v. Gladstone*, *supra*, is well explained by Joyce, J., in *Scott v. Scott*, 89 L.T.R. 582. He says that it decides (1) that where the accounts from which the sum to be paid is to be ascertained are only accounts for the purpose of ascertaining the profits, the goodwill is not to be included in the account, and (2) that the goodwill is not to be taken in ascertaining what is to be paid, when to ascertain what is to be paid is simply to take a figure from the annual account.

I find nothing to bind the parties except when the accounts are signed—which the 1914 balance-sheet is not—and there is no agreement anywhere by which the deceased partner agreed to be bound and concluded by what the surviving partner might do in compiling a balance-sheet.

I base my dissent from the main holding in the judgment below on the fact that the parties have not definitely stated an option to, or a right of purchase by, the surviving partner—a very usual and well-understood thing. The Court should not imply it where the expressions used and the machinery provided for dealing with the situation caused by the death of the partner can be intelligibly construed and worked out otherwise.

I think the questions should be answered as follows:—

1. No.
2. Yes.

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3. Balance-sheets not binding.

I agree with the judgment below as to interest and profits upon the deceased partner's share.

The appeal should be allowed with costs.

MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

*Appeal allowed in part.*

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July 12.

[APPELLATE DIVISION.]

REX v. NERLICH.

*Criminal Law—Conspiracy—Indictment of two Defendants and "Others"—Acquittal of one Defendant—Conviction of Remaining Defendant—Inciting and Assisting Alien to Join Enemy's Forces—Conspiracy between Defendant and Alien Named in Indictment but not as Conspirator—Evidence.*

The two defendants, N. and his wife, were indicted for that they did "maliciously and traitorously conspire, confederate, and agree with each other, and with others, to aid and comfort the enemy of His Majesty the King by inciting and assisting one Z., a German subject of the Emperor of Germany, a public enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces." etc. The jury rendered a verdict of "not guilty" as to the wife, and of "guilty" as to N.:—

*Held* (HODGINS, J.A., dissenting), upon a case stated by the trial Judge, that N. could not under the indictment be guilty of conspiring with Z. to aid the enemy by aiding and assisting Z. to leave Canada and join the enemy's forces; and, there being no evidence of N. conspiring with any person other than Z., N., as well as his wife, should be acquitted.

*Per* MACLAREN, J.A.:—If it had been intended to include Z. as one of the conspirators, he should have been named in the indictment as one of the parties to the conspiracy. The idea of a man conspiring with "others" to incite himself is absurd. The word "others" in the indictment could not mean more than "persons unknown."

*Per* MAGEE, J.A.:—By alleging that "others" conspired with N. to aid the King's enemies by inciting Z. to join their forces, the draftsman excluded Z., of necessity, from the conspirators, as he could not be supposed to be charged with conspiring to incite himself. As the "others" were alleged to be parties to the whole conspiracy, the word "others" must mean the same persons throughout the indictment, though not necessarily throughout the evidence. Being exclusive of Z. as regards inciting Z., the word must also be exclusive of him as regards the other means of aiding the enemy.

*Per* HODGINS, J.A.:—The allegations must be read distributively, and failure to prove "inciting" did not condemn "assisting" to share the same fate. The aid and comfort intended was the presence of Z. in the enemy's forces; if N. agreed to send him and Z. agreed to go, they conspired together to effect that end; and that was the Crown's case.

Other questions of law stated by the trial Judge were considered by HODGINS, J.A., and resolved in favour of the Crown.

Case stated by MULOCK, C.J.Ex., as follows:—

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"The accused, Emil Nerlich and his wife H. Nerlich, were tried before me on the 22nd, 23rd, and 24th days of February, 1915, on the following indictment:—

"The jurors for our Lord the King present that Emil Nerlich and H. Nerlich, in the months of September, October, November, and December, in the year of our Lord one thousand nine hundred and fourteen, and in the month of January, in the year of our Lord one thousand nine hundred and fifteen, at the city of Toronto, in the county of York, and Province of Ontario, within His Majesty's dominions, did maliciously and traitorously conspire, confederate, and agree with each other, and with others, to aid and comfort the enemy of His Majesty the King by inciting and assisting one Arthur Zirzow, a German subject of the Emperor of Germany, a public enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces, and by giving information to assist the said enemy and by trading with the said enemy, contrary to the Criminal Code.'

"There was no evidence to sustain the charge against H. Nerlich, and under my direction the jury returned a verdict of 'not guilty.' A verdict as set out in the notes was found by the jury against the accused Emil Nerlich.

"At the request of counsel for the accused Emil Nerlich, I have reserved the following questions for the opinion of this Honourable Court:—

"1. Were the objections taken at the trial to admission of evidence well-founded and should I have given effect to the same?

"2. Was there evidence (admissible and sufficient) against the accused Emil Nerlich on which he could properly be convicted on the said indictment?

"3. Does the indictment disclose any offence to which any of the evidence properly admissible was applicable?

"4. Was the witness Zirzow capable of being a co-conspirator; and, if so, should I have charged the jury, as requested by counsel for the accused Emil Nerlich, that Zirzow's evidence

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was the evidence of an accomplice, and should be corroborated or at least viewed with suspicion?

"5. The original indictment preferred against the accused Emil Nerlich was on the charge of treason, and was as follows:—

" 'The jurors for our Lord the King present that Emil Nerlich, in the months of September, October, November, and December, in the year of our Lord one thousand nine hundred and fourteen, and in the month of January in the year of our Lord one thousand nine hundred and fifteen, at the city of Toronto, in the county of York, and Province of Ontario, within His Majesty's dominions, maliciously and traitorously assisted, aided, and comforted the enemy of His Majesty the King by inciting and assisting one Arthur Zirzow, a German subject of the Emperor of Germany, a public enemy now at war with His Majesty, the King, to leave the Dominion of Canada and join the enemy's forces, and by giving information to assist the said enemy and by trading with the said enemy, contrary to the Criminal Code.'

"Subsequently, and after the commencement of the assizes, the grand jury, on presentment, found the indictment first above set out against the accused Emil Nerlich and his wife H. Nerlich. Counsel for the accused Emil Nerlich contended that the accused Emil Nerlich should be tried on the indictment charging treason before being tried on the indictment with H. Nerlich charging conspiracy, and contended that the evidence to be called by the Crown on the charge of treason must of necessity be practically the same evidence as on the charge of conspiracy. Should I have sustained the objection of counsel for the accused Emil Nerlich?

"6. Might the references made by Crown counsel to certain letters, which were not in evidence against the accused Emil Nerlich, have prejudiced the fair trial of the accused Emil Nerlich?

"7. Did the language of Crown counsel amount to a comment by him on the failure of the accused Emil Nerlich to testify?

"8. Should I have given effect to the objection of counsel for the accused Emil Nerlich, that the accused Emil Nerlich could not under the indictment be guilty of conspiring with Arthur Zirzow 'by aiding and assisting the said Arthur Zirzow to leave Canada to rejoin the German army?'

"9. Was I right in directing the jury to render their verdict

either 'guilty' or 'not guilty' as charged in the indictment, after the foreman of the jury had stated that the jury found the accused Emil Nerlich guilty of conspiring with one Arthur Zirzow by aiding and assisting the said Arthur Zirzow to leave Canada to rejoin the German army?

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"10. Might the statements of Crown counsel, by way of opening or otherwise, have prejudiced the fair trial of the accused Emil Nerlich,

"11. Might the nature of the closing address of Crown counsel to the jury have prejudiced the fair trial of the accused Emil Nerlich?

"The evidence taken at the trial, the particulars given by the Crown under my direction, the addresses of counsel, and my charge, are made a part of this case."

May 25 and 26. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*G. F. Shepley, K.C., I. F. Hellmuth, K.C., and G. W. Mason,* for Emil Nerlich. The learned trial Judge should have given effect to the objection urged before him, and since incorporated as question number 8 of the reserved case, that the accused Emil Nerlich could not, under the indictment, be guilty of conspiracy with Arthur Zirzow. There was no charge that Nerlich conspired with Zirzow; and, as there was no evidence to shew conspiracy by Nerlich with any one else, the conviction should be quashed. If the Crown intended to accuse Zirzow as a conspirator, his name should have been inserted in the indictment. It could not have been intended to include him in the word "others," because that would presuppose the absurdity of a man inciting himself: *Rex v. Perrin and Burst* (1908), 72 J.P. 144. As there was no evidence that Emil Nerlich conspired with any one but Zirzow, the conviction should be quashed. The evidence supported only a charge of treason itself, not of conspiracy to commit treason: *State v. Setter* (1889), 18 Atl. Repr. 782; *United States v. Gardner* (1890), 42 Fed. Repr. 829; Phipson's Law of Evidence, 5th ed., pp. 78 to 87; *Regina v. Boulton* (1871), 12 Cox C.C. 87; Criminal Code, R.S.C. 1906, ch. 146, secs. 74, subsec. 1(i), 1002, 847, 853. There was no *mens rea* proved: *Dun-*



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*leavey's Case* (1908), 1 Cr. App. R. 240; Halsbury's Laws of England, vol. 9, para. 504; *Rex v. Ahlers*, [1915] 1 K.B. 616, at p. 623; *Rex v. Goodfellow* (1906), 11 O.L.R. 359. If Zirzow was treated as a co-conspirator, then his evidence was not sufficient to convict; it should be treated with suspicion, and the Court should have warned the jury to be careful in accepting it: *Rex v. Frank* (1910), 21 O.L.R. 196; *Cohen's Case* (1914), 10 Cr. App. R. 91; *Rex v. Tate*, [1908] 2 K.B. 680; *Warren's Case* (1909), 2 Cr. App. R. 194; *Rex v. McNulty* (1910), 22 O.L.R. 350; *Rex v. Beauchamp* (1909), 25 Times L.R. 330; Halsbury's Laws of England, vol. 9, paras. 755, 780. Much evidence harmful to the accused was improperly admitted. The memorandum-pad found in his desk should not have been allowed in; nor should the letters to Mrs. Nerlich: *Rex v. Pollard and Tinsley* (1909), 19 O.L.R. 96; *Regina v. Zulueta* (1843), 1 C. & K. 215; *Regina v. Bernard* (1858), 1 F. & F. 240. The evidence of Lees that Zirzow said to him after the Police Court proceedings, "I let Nerlich down pretty light," was not admissible, as it amounted to a contradiction of the Crown's own witness: *Regina v. Berens* (1865), 4 F. & F. 842; *Seham Yousry's Case* (1914), 11 Cr. App. R. 13; *Regina v. Gibson* (1887), 18 Q.B.D. 537; *Dibble's Case* (1908), 1 Cr. App. R. 155; Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 9; *Attorney-General v. Hitchcock* (1847), 1 Ex. 91; Roscoe's Criminal Evidence, 12th ed., p. 375; *Regina v. Whelan* (1881), 14 Cox C.C. 595. It was no matter for comment that the accused did not testify in his own behalf, and yet the language of the Crown counsel amounted to comment of that nature: *Rex v. Romano* (1915), 24 Can. Crim. Cas. 30. The address of the Crown counsel was of a highly inflammatory nature, and tended to prejudice the jury against the accused: *State v. Clark* (1911), 131 N.W. Repr. 369; Bishop's New Criminal Procedure, pp. 791 to 794; *Regina v. Thursfield* (1838), 8 C. & P. 269.

*J. R. Cartwright*, K.C., *E. E. A. DuVernet*, K.C., and *Edward Bayly*, K.C., for the Crown. The conviction should be sustained. The conspiracy itself is the offence charged, and it was proved. The assisting or inciting is only the means, and is a matter of evidence: *Regina v. Blake* (1844), 6 Q.B. 126. Zirzow might not be able to incite himself, in the ordinary acceptation of that term.

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but there is no reason, we submit, why he could not conspire with others to assist the King's enemies: *Regina v. Weir* (1899), 3 Can. Crim. Cas. 351; *Rex v. Duguid* (1906), 75 L.J.N.S. K.B. 470; *Regina v. Frawley* (1894), 25 O.R. 431. It was pointed out several times at the trial by the Crown that Zirzow was included in the word "others," and the trial proceeded on that view. As to the objection that Zirzow's evidence to be effective should have been corroborated, we submit, first, that that was not necessary; but, if necessary, it was corroborated by many circumstances: *Cohen's Case*, 10 Cr. App. R. 91. There is no such rule in this Province as that the jury must be warned to view the evidence of an accomplice with suspicion. But, even if that were the law, the variance of Zirzow's testimony in the Police Court and in the Assize Court put the jury sufficiently on their guard. Though the jury might discredit some of Zirzow's testimony, they might believe enough of it to prove that there was joint guilty knowledge, and joint intent, thus indicating the *mens rea*. The jury may presume the intent from the circumstances and acts: *Rex v. Ahlers*, [1915] 1 K.B. 616. There was nothing to prevent the jury considering the fact that Nerlich did not testify in his own behalf: *Rex v. Clark* (1901), 3 O.L.R. 176. No evidence was admitted which could cause any substantial wrong to the accused: *Ibrahim v. The King*, [1914] A.C. 599; *Rex v. Sunfield* (1907), 15 O.L.R. 252. As to the evidence of Lees, we submit that it was quite harmless, as the facts elicited by it were apparent from other evidence: *Rex v. Laurin* (1902), 6 Can. Crim. Cas. 135. As to the address of the Crown counsel being inflammatory, we submit that it could not have been in any way prejudicial, or the trial Judge would have interfered. The learned Judge's charge was eminently fair.

*Hellmuth*, in reply.

July 12. MACLAREN, J.A.:—Emil Nerlich and his wife, H. Nerlich, were indicted for that they did "maliciously and traitorously conspire, confederate, and agree with each other, and with others, to aid and comfort the enemy of His Majesty the King by inciting and assisting one Arthur Zirzow, a German subject of the Emperor of Germany, a public enemy now at war with

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His Majesty the King, to leave the Dominion of Canada and join the enemy's forces," etc.

At the close of the case for the Crown, the trial Judge directed the jury that there was no evidence on which Mrs. Nerlich could be convicted of conspiracy, and the jury accordingly rendered a verdict of "not guilty" as to her.

A number of objections were then raised on behalf of Emil Nerlich, which were overruled by the trial Judge, and the case went to the jury. The jury first brought in a special verdict, saying: "We find the accused Emil Nerlich guilty of conspiring with one Arthur Zirzow by aiding and assisting the said Arthur Zirzow to leave Canada to rejoin the German army." This verdict was not accepted by the trial Judge, and the jury were directed to render a verdict of either "guilty" or "not guilty" as charged in the indictment. They returned with the verdict, "We find the accused Emil Nerlich guilty."

At the request of counsel for the accused, eleven questions of law were reserved for this Court. As the 8th question appears to me to be fundamental and to go to the root of the matter, I shall consider it first. It reads as follows: "8. Should I have given effect to the objection of counsel for the accused Emil Nerlich, that the accused Emil Nerlich could not under the indictment be guilty of conspiring with Arthur Zirzow 'by aiding and assisting the said Arthur Zirzow to leave Canada to rejoin the German army?'"

If only Mr. and Mrs. Nerlich had been indicted for conspiracy, her discharge would necessarily have been followed by his. "Where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both convicted:" *Regina v. Manning* (1883), 12 Q.B.D. 241; *Rex v. Plummer*, [1902] 2 K.B. 339. Archbold's Criminal Pleading and Evidence, 24th ed., p. 1420, after citing the foregoing rule, states the exception to it as follows: "unless they are also charged with conspiring with persons unknown, in which case the conspiracy must be alleged to be with a certain person (or persons) to the jurors unknown;" and then refers to 3 Chitty's Criminal Law, p. 1141, where it is stated in substantially the same terms, and several high authorities are cited in support of the proposition.

To put it at the highest for the prosecution, the word "others" in the indictment cannot be construed to mean more than the expression above quoted from Archbold. Good faith on the part of the Crown requires that the names of all the persons known and respecting whose part in the conspiracy evidence is to be tendered, should be given in the indictment, or in the particulars, as the case may be. If it had been intended to include Zirzow as one of the conspirators, his name should have been given in the indictment, as the Crown was well aware of the part he had taken in the matters that formed the basis of the prosecution, and his name appears as the first witness on the back of the indictment, and it has been initialled by the foreman of the grand jury as evidence of Zirzow's having been sworn before them. The name of Zirzow appears in the indictment only as a person to be incited and assisted to leave Canada and join the enemy's force, but not as a party to the conspiracy.

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In the trial of a case of conspiracy in the Court of King's Bench at Montreal, *Rex v. Johnston* (1902), 6 Can. Crim. Cas. 232, it came out in evidence that a person not named as a conspirator in the indictment or particulars was a party to the conspiracy, and the trial Judge ordered his name to be added to the particulars. On a motion for a reserved case, Hall, J., said that where the co-conspirator was known in advance it was the duty of the prosecution to furnish the name in the indictment. He added (p. 236): "On a charge of conspiracy, more than any other, an accused person is entitled to know the names of those with whom he is alleged to have conspired, inasmuch as the act or statement of such co-conspirator, even done or made out of the presence of the accused, may be used as evidence against him, as soon as the offence is proved and the connection of the several parties with it. But, in the case under consideration, there was no proof, in advance, to establish the name of any person with whom the accused was conniving."

In that case the amendment was allowed because the application was made as soon as the Crown became aware of the fact, and because the accused was not prejudiced thereby.

But there is more in this case. The Nerlichs and the "others" referred to in the indictment are charged with conspiring to

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aid the enemy by inciting and assisting Zirzow to leave Canada and join the enemy's forces. The same persons are accused of "inciting" and "assisting" him. The idea of a man conspiring with others to incite himself seems to be an absurdity. To attempt to put such a meaning upon the language of this indictment is surely something entirely at variance with the plain language of the instrument, and could not possibly have been in the mind of the draftsman. In imputing or charging a crime, the language of the indictment should be clear and unmistakable; and I do not think it should be necessary to resort to an interpretation that may not inaptly be described as fanciful and far-fetched.

In my opinion, the 8th question should be answered in the affirmative.

In the argument before us it was not claimed by the counsel for the Crown that there was any evidence of Emil Nerlich having conspired with any other person than Zirzow, and I am unable to discover any such evidence in the stated case. It consequently follows that the second question reserved by the trial Judge—which reads as follows, "Was there evidence (admissible and sufficient) against the accused Emil Nerlich on which he could properly be convicted on the said indictment?"—should be answered in the negative.

In my opinion, it becomes unnecessary to answer any of the other questions reserved.

MEREDITH, C.J.O., and GARROW, J.A., concurred. •

MAGEE, J.A.:—The question turns upon the meaning to be attached to the word "others" in the only count in the indictment. By alleging that those others conspired with Emil Nerlich to aid the King's enemies by inciting Zirzow to join their forces, the draftsman excluded Zirzow, of necessity, from the conspirators, as he could not by any reasonable construction be supposed to be charged with conspiring to incite himself.

As the "others," whoever they were, are alleged to be parties to the whole conspiracy, the word "others" must mean the same persons throughout the indictment, though not necessarily

throughout the evidence. Being exclusive of Zirzow as regards inciting Zirzow, the word "others" must therefore also be exclusive of him as regards the other means of aiding the enemy.

The result, in my opinion, is that there was no charge that Nerlich conspired with Zirzow; and, as the evidence failed to establish conspiracy by Nerlich with any one else, it would follow that he should have been acquitted.

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HODGINS, J.A. (dissenting):—Early in the trial it was ruled that the case was laid under sec. 573 of the Criminal Code: "Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence."

Assisting any public enemy at war with the King, in such war "by any means whatsoever," is an indictable offence under sec. 74, sub-sec. 1(i) and sub-sec. 2. The real offence, therefore, is conspiracy to assist the public enemy; and, if it is necessary to set out the means in detail, which I doubt (see Criminal Code, sec. 847), it certainly cannot be imperative that all of them shall be proved as laid. In this case the means alleged are (1) inciting, (2) assisting Zirzow to leave the country, (3) giving information, (4) trading with the enemy; and I think proof of any one of them would be sufficient. It cannot be too strongly emphasised that the conspiracy itself is the offence, and that whether anything was done in pursuance of it or not is immaterial except as matter of evidence of that conspiracy: *Rex v. Seward* (1834), 1 A. & E. 706; *Rex v. Richardson* (1834), 1 M. & Rob. 402; *Rex v. Kenrick* (1843), 5 Q.B. 49; *Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306, 317; Archbold's Criminal Pleading and Evidence, 21st ed., p. 404; *Regina v. Bunting* (1885), 7 O.R. 524.

In *Rex v. Gill* (1818), 2 B. & Ald. 204, the indictment charged that the defendants conspired "by divers false pretences and subtle means and devices to obtain from A. divers large sums of money, and to cheat and defraud him thereof," and it was held by Abbott, C.J. (p. 205), that "the offence of conspiracy may be complete, although the particular means are not settled and resolved on at the time of the conspiracy." Bayley, J. (p. 205): "When parties have once agreed to cheat a

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particular person of his moneys, although they may not then have fixed on any means for that purpose, the offence of conspiracy is complete. This case appears to me not distinguishable in principle from *The King v. Eccles* (cited in 6 T.R. 628, and reported in the last edition of Leach's Crown Law, 274), which decided that the means need not be stated; and there Buller, J., said, 'that the means were matter of evidence to prove the charge and not the crime itself.' It is therefore not necessary to state the means at all in the indictment, it being quite sufficient to charge the defendants with the illegal conspiracy, which is of itself an indictable offence."

In *Regina v. Blake*, 6 Q.B. 126, "a count for conspiracy charged that T. and B. conspired to cause certain goods . . . to be carried away from the port and delivered to the owners without payment of a great part of the duties, with intent thereby to defraud the Queen; not further describing the goods or the means of effecting the objects of the conspiracy." This indictment was held good by a Court consisting of Lord Denman, C.J., Patteson, J., and Wightman, J.; Patteson, J., saying: "As to a future plea of *autrefois convict* or *autrefois acquit*, the identity of the offence must be matter of evidence in ninety-nine instances out of one hundred, in the case of charges of conspiracy. We know that a general count for a conspiracy to bring the House of Commons into contempt would be good, though the means were not set forth; and, in such a case, the identity of the offence, if the party were indicted again, must be made matter of evidence."

The force of the words "by any means whatsoever" can best be understood by contrasting them with the indictment in *Rex v. Goodfellow*, 11 O.L.R. 359, and the reasons given in that case at pp. 362 *et seq.* for quashing the count in question.

Granting, however, that, to use the words of the statute in the indictment, "by any means whatsoever," would be too vague, and that in cases of conspiracy to commit treason the means must be disclosed, on the theory that treason of the kind charged must involve the use of definite means, it does not necessarily follow that the means, if set out, must all be proved to have been put into operation. If this be not so, then if in this case a con-

piracy to trade with the enemy were proved, yet the prosecution must fail if the Crown did not prove that the conspiracy included an agreement to give information to the enemy. This would result in the alleged methods dominating the crime of conspiracy, instead of the agreement being the essence of the criminal act charged. It would also make the statement of projected or accomplished acts dangerous unless set out in separate indictments—a course not necessary where the crime is one and indivisible, such as conspiracy.

Objection was, however, taken to the indictment in that, owing to the use of the word "incite," it could not have been intended to charge the accused with conspiracy with Zirzow. The form of the indictment is "that Emil Nerlich and H. Nerlich, in the months of September, October, November, and December, A.D. 1914, and in the month of January, A.D. 1915, at the city of Toronto, etc., did maliciously and traitorously conspire, confederate, and agree with each other, and with others, to aid and comfort the enemy of His Majesty the King by inciting and assisting one Arthur Zirzow, a German subject of the Emperor of Germany, a public enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces," etc.

I do not see why, apart from that objection, the words "and with others" cannot include Zirzow. As pointed out, the charge is conspiring to aid and comfort the public enemy. Why cannot that conspiracy be between the accused and Zirzow as well as between the former and any one else? The aid and comfort intended was the presence of Zirzow at the front; and, if the accused agreed to send him and Zirzow agreed to go, I should have thought it impossible to imagine a clearer case of conspiring together to effect that end. That that was the Crown's case is made clear at pp. 73, 123, and 184 of the notes of evidence submitted.

In *Regina v. Thompson* (1851), 16 Q.B. 832, where A. was indicted for conspiring with Y. and Z. and other persons to the jurors unknown, the Court held that "other persons" must mean persons other than A., Y., and Z., so that, if A. was convicted, but Y. and Z. acquitted, A. must go free also.

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While therefore "others" would exclude H. Nerlich, it would include Zirzow, unless he is excluded by the use of the words I have mentioned. I am unable to agree with the contention that two persons cannot conspire and agree to incite one of the two to do a certain act. "Inciting" is urging or stimulating. If one person is inclined to take a certain line, and is willing to do so, if he can be convinced that that is the right or expedient course to take, and points out the amount of argument, incitement or inducement, monetary or otherwise, he requires to persuade him to it, and there is another person anxious to have him act, there does not seem to me any great difficulty in seeing that an agreement might result which could be described as a conspiracy between A. and B. to incite B. to take a certain course. But the word is not a happy one in the connection in which it is used, and I prefer to answer the objection as I have suggested, namely, that the allegations must be read distributively, and that failure to prove "inciting" does not condemn "assisting" to share the same fate. "A solicitation or inciting of another, by whatever means it is attempted, is an act done:" *Rex v. Higgins* (1801), 2 East 5, at p. 23.

Unless the word "incite" is so inseparably connected with "assist" that it dominates and controls it, and thereby involves an idea quite inconsistent with the thought that Zirzow can be indicated by the word "assist," there ought to be no difficulty. I fail to see any good reason for such a critical construction of this indictment, which, if correct, would disable the Crown from succeeding if, instead of proving assistance to Zirzow, they had established that he was enabled to trade with the enemy in consequence of or pursuant to the conspiracy.

The fact that the Crown, in effect, pointed out three times that Zirzow was regarded as comprehended in the word "others," and that the trial proceeded wholly on that view, though against the protest of the accused's counsel, renders the contention one of extreme technicality, although in point of law still open.

I have studied the evidence in the case, and, excluding for the moment the controversial parts of Zirzow's evidence, it appears clear that sufficient facts were proved to leave the learned trial

Judge with no alternative except that of leaving the case to the jury. I omit any recapitulation of them, because, subsequently to my analysis of the evidence, the accused was, after giving his own evidence, acquitted on a charge involving practically the same facts. But, as the other questions affect the regularity of the trial, I think it is proper and desirable to deal with them.

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Objection was taken that the evidence of Zirzow, if he was to be treated as an accomplice, was, for that reason, insufficient to convict, or that it must be regarded with suspicion, and that the jury should have been so informed. There is no rule of law or practice that the jury must be instructed that they cannot convict on the evidence of an accomplice, nor that they must view it with suspicion: *Rex v. Frank*, 21 O.L.R. 196; *Rex v. Ahlers*, [1915] 1 K.B. 616.

But there was in this case a very peculiar feature which was clearly before the mind of the jury and which renders it almost impossible to say that they did not, apart from any direction by the trial Judge, carefully and critically weigh the evidence of Zirzow. He had made statements in the Police Court on oath and had signed written statements, much stronger than his evidence at the Assize Court. During the trial, a characteristic peculiarity was discovered, in that, according to Zirzow, a German must be sworn with three fingers extended, and that, in the absence of that secret custom, it is not incumbent upon a German officer to speak the truth in the witness-box. The jury themselves examined Zirzow upon this point, and elicited from him the admission that he was telling the truth at the trial. They, therefore, were confronted with the duty of determining whether the testimony he was then giving, shorn of what he had formerly stated, was the truth reduced to its lowest dimension, or whether they would believe him at all.

It was argued before us that Zirzow's denial of his former and ampler testimony destroyed the value of those antecedent statements, and I accept that view. That in itself discredited him, but it did not, if the jury chose to believe his then admissions, destroy the effect of what he was stating, or the other circumstances in evidence. If both together established any

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design, then the jury might presume that the full purpose was known or suspected, and in that way a joint intent to aid and comfort the enemy was proved.

The contention that corroborative evidence was absent is not established. It is unnecessary to indicate specifically what it consisted of, for the reason previously given. But it was of such a nature that it entirely accorded with the evidence of Zirzow in several material particulars.

The evidence for the prosecution was, as might be apprehended, slight. But the question, after all, is this: Was it sufficient to enable a jury to give the verdict which they did? They had a right to take into consideration the fact that the accused did not in this case meet the charge with his own evidence; and, although that fact cannot be made a matter of open comment during the trial, the jury is free to consider it, and so is this Court; in determining the issue. The statute permitting the accused to give evidence is a public one, and is in fact well known to all the community.

In *Rex v. Clark*, 3 O.L.R. 176, Osler, J.A., at p. 179, says: "We cannot direct the conviction to be reversed merely because we may think that on the evidence, as he (the Judge) reports it, he ought to have decided, or that it would have been safer to have decided, differently. If upon a perusal of the case we are bound to say that there was in point of law evidence which, if the case had been tried by a jury, the Judge must have submitted to them, or which, there being no jury, he was himself—as a jury—free to consider and determine what weight should be attached to it, we have no jurisdiction to interfere, the trial Judge not having given leave to apply for a new trial on the ground that the verdict was against the weight of evidence. If there was no such evidence, it is within our province to say so, but if there was, then, so far as the case turns upon the conclusion to be drawn from it and from any inferences it was justly capable of, including all questions as to the credibility of the witnesses, the decision cannot be disturbed." And at p. 181: "The Judge was at liberty (as a jury are, though they must not be told so) to draw an inference unfavourable to the prisoner from the fact that he did not testify on his own behalf, if, at least, he was dissatisfied

with the report of the witness Scott of the evidence given by him on the Keefer trial." Armour, C.J.O., Maclellan, Moss, and Lister, JJ.A., concurred.

In this case the jury were therefore entitled to come to their own conclusion and to draw their own inferences, which this Court cannot disturb.

In *Rex v. Brisac and Scott* (1803), 4 East 164, Grose, J., speaking for the Court, said (p. 171): ". . . conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which hardly ever are confined to one place."

In *Regina v. Connolly and McGreevy* (1894), 25 O.R. 151, Ferguson, J., at p. 175, quotes this as authoritative. Speaking of *Rex v. Bowes* (1787), cited in 4 East at p. 171, Ferguson, J., says: "That case seems to indicate very plainly that where there is no direct evidence of the fact of conspiracy the acts of each and every of the alleged conspirators can be given in evidence for the purpose of proving that there was a conspiracy, if such acts were done apparently in furtherance of the common design."

In *Rex v. Sir Francis Burdett* (1820), 1 St. Tr. (N.S.) 1, 3 B. & Ald. 717, 4 B. & Ald. 95, Best, J., says (4 B. & Ald. at p. 121): "We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilised countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not

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act upon this principle. Lord Mansfield, in the *Douglas* case, gives the reason for this. 'As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that Judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other.' In the highest crime known to the law, treason, you act upon presumption. On proof of rebellion, or the endeavour to excite rebellion, you presume an intent to kill the King. In homicide, upon proof of the fact of killing, you presume the malice necessary to constitute murder, and put it on the prisoner, by extracting facts in cross-examination, or by direct testimony, to lower his offence to manslaughter, or justifiable homicide. In burglary and highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, if the libel is calculated to produce the effect charged to be intended, you presume the intent. It therefore appears to me quite absurd, to state that we are not to act upon presumption. . . . Presumption means nothing more than, as stated by Lord Mansfield, the weighing of probabilities, and deciding, by the powers of common sense, on which side the truth is."

Holroyd, J., p. 140, says: "But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the receiving and giving due effect to such proofs. The presumption arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true; and according as he does or does not produce such contrary evidence. It is estab-

lished as a general rule of evidence, that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, which lies more particularly within his own knowledge, or of which he is supposed cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, un rebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

Abbott, C.J., at p. 161, says: "A presumption of any fact is, properly, an inferring of that fact from other acts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained, by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the

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conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know, that, where reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtilty and refinement." And at p. 167: "It is not necessary to sustain the verdict on this point, that this should be the only conclusion that could be drawn from the premises. Matters of fact are for the determination of the jury; if they draw a conclusion not warranted by the premises before them, it is our duty to correct their error, and to send the case to another trial; but if the conclusion is a reasonable inference from the premises, we ought not to disturb their verdict. I think this conclusion the most reasonable inference from the premises, and that the Judge was perfectly justified in presenting the matter to the jury for their consideration, in this light, with a strong expression of his own opinion in favour of this conclusion."

This case was one very fully argued and thoroughly considered.

This Court cannot draw inferences; that is for the jury. As the issue in this case was identical with that in *Rex v. Ahlers*, [1915] 1 K.B. 616, the remarks of Lord Reading, C.J., may be quoted (p. 625): "It cannot be doubted that his intention and purpose in doing the acts were material to the issue which was then before the jury. . . . It is not for this Court to pronounce an opinion as to which of those two views" (i.e., evil intent or no intent to injure British interests) "was correct. . . . We cannot say that it follows from the evidence that the actions of the appellant were necessarily hostile to this country in intention and purpose; although there was undoubtedly evidence upon which the jury might have so found."

Evidence was said to have been improperly admitted. (1) The memorandum found in the accused's desk (exhibit 1). I can see no possible objection to this. (2) Letters to Mrs. Nerlich.

These were properly admitted as against her, as she was on trial as a conspirator, but after her discharge they were not given to the jury. (3) The statements of Bushel and Lees, in answer to the statement of Zirzow that they had influenced him to give prejudiced evidence and to sign statements, were not, in my view, admissible. A reason for making a false statement, unless in some way it can be said to qualify the conscious making of the statement, as for instance that the maker was drunk, or too excited to know what he was doing, is not a relevant fact. The denial that influence had been used, if not proper to be given in evidence, would, however, not justify any Court in finding that a substantial wrong or miscarriage had taken place. But what Lees was permitted to state, *i.e.*, that Zirzow said to him, after the Police Court proceedings, "I let Nerlich down pretty light," would have raised a serious question, if a comparison of the statements said by Zirzow to be false, and his evidence while before the jury, did not demonstrate the absurdity of the remark. That being so, it would be idle to debate whether or not the evidence of Lees was or could be injurious, having regard to its probable effect on the jury.

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I am unable to find anything in the Criminal Code which justifies the granting of a reserved case on the ground that the address of counsel for the Crown was inflammatory and tended to prejudice the jury. It is within the discretion of the presiding Judge to interfere if he deems the speech of counsel improper. If so, how can the discretion of the appellate Court be substituted for what is vested in the trial Judge? The atmosphere of the trial and the tone and gestures of counsel must necessarily be important elements in determining the judicial discretion. If, therefore, the Judge is the only tribunal who can properly decide, I do not see what question of law arises.

The learned trial Judge, however, in effect directed the jury to leave out of consideration everything but the facts of the case. He said: "These are questions of fact for you to determine, gentlemen, and in determining them I must ask you, and it is hardly necessary for me to ask you, for I feel I would be almost giving you ground for complaint if I did ask you, but I feel in my own case and perhaps you do in your case that when



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we are sitting in judgment, you and I, as we are to-day, upon the rights of a citizen whose nation is at war with Great Britain, there is a danger, unless we are careful, that prejudice may enter our minds; and so we must all be extremely careful when administering justice that we allow nothing but evidence to get into the scales of justice. It is for you to hold up the scales of justice and put the evidence in and weigh it, as the apothecary would the most valued articles, and allow nothing to get into either scale that will disturb the balance, unless it be lawful evidence. If you allowed your prejudice to get into the scale and do violence to the truth, you yourselves would be committing as great an act of treason as this man if he were guilty."

On the whole case, I am of opinion that no reason has been shewn which would warrant an appellate Court in disturbing the verdict.

*Conviction quashed; HODGINS, J.A., dissenting.*

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[APPELLATE DIVISION.]

July 12.

REX v. SNYDER.

*Criminal Law—Treason—Attempt to Commit—Evidence—Criminal Code, secs. 72, 74—"Assisting" Aliens to Leave Canada to Join Enemy's Forces—Overt Acts Forming Part of a Series—Trap-evidence—Enemies not Desiring to Leave Canada—Jury—Verdict—Form of.*

The prisoner was indicted for treason—assisting the public enemy (clause (i) of sec. 74 of the Criminal Code), by inciting and assisting four named persons, subjects of the Emperor of Austria, a public enemy now at war with His Majesty the King, to leave Canada and join the enemy's forces, etc. Counsel for the Crown did not ask for a conviction for treason, but for an attempt to commit the treason with which the prisoner was charged. The jury found the prisoner "guilty of attempting to commit treason, but did not realise the seriousness of his act:"—

*Held*, that this was not equivalent to a verdict of "not guilty;" it was a verdict of "guilty," with a rider to the effect that the prisoner attempted to do the act with which he was charged, without realising that the offence he was committing was as serious as it in fact is.

*Held*, also, that under clause (i) of sec. 74 the treason consists in "assisting," and the forming and manifesting by any overt act of an intention to assist is, under the Code, not treason, but is an indictable offence (an attempt) under sec. 72.

The evidence, stated briefly, was, that the prisoner made a bargain with one B., who was set on by the military authorities to trap the prisoner, to convey the four Austrians named in the indictment from Canada to the United States by putting them across the Niagara river in a boat. The prisoner accepted money from B. for his promised service, and

secreted the four men on his premises near the river. There was evidence that he intended to take the men across the river for the purpose mentioned in the indictment, and evidence from which the jury might properly conclude that, if the prisoner had not been arrested, he would have carried out that intention:—

*Held*, that an attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted; and the bargain the prisoner made with B., and his acts with reference to the four men, were overt acts forming part of such a series.

*Res v. Linneker*, [1906] 2 K.B. 99, and *Regina v. Taylor* (1859), 1 F. & F. 511, followed.

The evidence shewed that the four men named in the indictment had no intention of leaving Canada for the purposes mentioned in the indictment or for any other purpose, and that they had no knowledge that the purpose of their being brought to the prisoner's premises was that he might take them across the river for any such purpose at all—the whole affair was a sham, though the prisoner thought it was real:—

*Held*, that there was no evidence that the prisoner incited the men or any of them to leave Canada, and it could not be said that he assisted them to leave or attempted to do so: to assist another involves the idea of a desire, or at least a willingness, to be assisted on the part of the person who is said to have been assisted—and, according to the evidence, there was neither.

*Held*, therefore, that there was no evidence proper to be submitted to the jury of the offence charged in the indictment, or of an attempt to commit it.

CASE stated by BOYD, C., as follows:—

“The defendant, Joseph Snyder, was tried at a special adjourned sittings of the assizes at Welland before me on the 7th day of April, 1915, on the following indictment:—

“The jurors for our Lord the King present that Joseph Snyder on the 14th day of November, in the year of our Lord one thousand nine hundred and fourteen, at the township of Willoughby, in the county of Welland, and Province of Ontario, within His Majesty's dominions, maliciously and treacherously assisted, aided, and comforted the enemy of His Majesty the King, by inciting and assisting Chares Karoly, Steve Padunadic, Mick Markie, and Peter Yuvatovich, Austrian subjects of the Emperor of Austria, a public enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces, and by giving information to assist the said enemy, and by trading with the said enemy, contrary to the Criminal Code.

“The Crown counsel, in opening the case for the Crown, stated to the jury that he was not asking them to find the defendant guilty of treason, but of an offence of a less serious nature, namely, the attempt to commit treason.

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"This opinion I concurred in, and instructed the jury that they had the right, if they saw fit to do so, to find the defendant guilty of the offence of attempting to commit treason.

"The evidence for the Crown established the following facts:—

"From information received by them, the military authorities at Welland suspected the defendant of assisting the enemy by conveying Austrian subjects across the Niagara river to the United States after the war broke out, and about the 14th November, 1914, they sent one Jack Bugarski, who was in their employment, to the defendant. The said Bugarski represented to the defendant that he was a foreman on the Welland canal, and that sixty or seventy Austrian reservists under him, who were under suspicion in the country, were anxious to get to Buffalo for the purpose of reporting to the Austrian consul there, and of saving their property in Austria from confiscation. The defendant, after several interviews, finally agreed with Bugarski that he would take these men across for \$10 each, and arranged with Bugarski that he would bring some of the men to his house on the Niagara river on an appointed night, when he, the defendant, would row them across to the United States.

"Bugarski, at the appointed time, appeared at the defendant's house with four Austrian reservists, and met the defendant as arranged. The defendant stated that the weather was too bad, and that he would have to defer taking the men across the river until the wind abated, and he conducted the men to an old house on the property, where he agreed to keep them until that time.

"The defendant provided the men with a light to be used in the house, and cautioned them to make no noise and to place the light so that it would not be observed from without. He was paid \$10 by Bugarski for each of the men in payment of his charge for taking them across the river. This payment was made in the house, in the presence of the men, by Bugarski. After the payment, Bugarski and the defendant left the house, locking the men in.

"After he left the building, he concealed the \$40 received by

him from Bugarski in an old cutter, and after he had concealed it he was arrested by the military authorities, who had men posted in the vicinity for the purpose of intercepting him on his way across the river. When he was arrested, he admitted that he had received the money, and told the authorities where he had concealed it.

"No evidence was called for the accused excepting two witnesses as to character.

"The jury returned a verdict as follows: 'Guilty of attempting to commit treason, but did not realise the seriousness of his act.'

"At the request of counsel for the defendant, I granted a reserved case, and submit the following questions for the opinion of this Honourable Court:—

"1. By common law or the Criminal Code is it an offence to attempt to commit treason?

"2. Was there sufficient evidence to justify me in submitting this case to the jury?

"3. Does the language used by the jury in their verdict, that the accused 'did not realise the seriousness of his acts,' amount to a verdict of 'not guilty?'"

June 7. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and KELLY, J.

A. C. Kingstone, for the prisoner, argued that there was no evidence to justify the verdict of "guilty" of attempting to incite or assist the men to leave Canada. The men in respect of whom the alleged offence was committed were Austrians, but not reservists, and the objects sought to be attained by them was merely the saving of their property, which is an innocent act. There is no such offence as intent to commit treason, nor does the Code make any provision as to such. He referred to Foster's Crown Law, p. 217; Russell on Crimes, 7th (Canadian) ed., vol. 1, p. 140. If the prisoner was guilty of anything, it was a case of ordinary smuggling—avoiding the immigration law. Counsel referred to *Rex v. Ahlers*, [1915] 1 K.B. 616. In this case the Crown incited the prisoner to commit or attempt to commit the offence—a practice which should not be encouraged

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by the Court. There was no evidence to justify a finding that the four men, who were merely part of the police machinery, were incited by the prisoner or that he attempted to assist them to leave Canada, or that the men themselves were intending to leave Canada. The verdict of the jury was equivalent to a verdict of "not guilty."

*J. R. Cartwright*, K.C., and *Edward Bayly*, K.C., for the Crown, referred to *Stephen's Digest of the Criminal Law*, 6th ed., p. 41, art. 51.

*Kingstone*, in reply.

July 12. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is a case stated by the Chancellor after the conclusion of the trial of the prisoner at the sittings at Welland on the 7th April, 1915.

The prisoner was indicted for treason, the indictment charging him with the offence mentioned in clause (i) of sec. 74 of the Criminal Code, and the means by which he is alleged to have assisted the public enemy were, "by inciting and assisting Charles Karoly, Steve Padunadic, Mick Markie, and Peter Yuvatovich, Austrian subjects of the Emperor of Austria, a public enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy's forces, and by giving information to assist the said enemy, and by trading with the said enemy, contrary to the Criminal Code."

Counsel for the Crown did not ask for a conviction for treason, but that the prisoner should be convicted of "an attempt to commit the treason with which he was charged."

The jury found the prisoner "guilty of attempting to commit treason, but did not realise the seriousness of his act."

It was argued that this was in effect a verdict of "not guilty," but that is clearly not so. All that the rider to the verdict of "guilty" expresses and means is, that the prisoner attempted to do the act with which he is charged, without realising that the offence he was committing was as serious as it in fact is.

It was also argued that an attempt to commit treason is treason; but, if that were the case, the jury have found the pri-

soner guilty of treason. No doubt, in the case of certain kinds of treason, the attempt, or even less than the attempt, is treason: e.g., "the forming and manifesting by any overt act an intention to kill His Majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or to imprison or to restrain him," is treason: sec. 74 (b). So also "the forming and manifesting, by an overt act, an intention to kill the eldest son and heir apparent of His Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland," is treason: sec. 74 (d).

But in the case of the kind of treason with which the prisoner was charged, which is the statutory offence defined by clause (i) of sec. 74, the treason consists in "assisting," and the forming and manifesting by any overt act an intention to assist is, under the Code, not treason, but is an indictable offence under sec. 72, which provides that "every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not;" and by sub-sec. 2 of that section it is provided that "the question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

Contrary to my first impression, I have come to the conclusion that the acts done by the prisoner amounted to an attempt to commit the offence charged in the indictment.

It is often very difficult to draw the line between what is only preparation to commit an offence, and an attempt to commit it; but, accepting the definition of an "attempt" given in Stephen's Digest of the Criminal Law, 1st ed., art. 49, which was approved by the Court in *Rex v. Linneker*, [1906] 2 K.B. 99, I am of opinion, subject to what I shall say upon the last branch of the case, that what was done by the prisoner had passed the stage of mere preparation and constituted an attempt to commit the offence.

That definition is, that "an attempt to commit a crime is an

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act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."

In the case of *Rex v. Linneker* the prisoner was indicted for having attempted to discharge a loaded revolver at the prosecutor with intent to do him grievous bodily harm. It was proved that, being asked by the prosecutor why the prisoner asked a question that he put to the prosecutor, the prisoner said, "I am going to tell you why," and at once put his hand in his pocket and commenced to pull something out. This proved to have been a loaded revolver. Before the prisoner got the revolver out of his pocket, the prosecutor laid hold of his arm. The prisoner got the revolver out of his pocket. While they were struggling, the prisoner said several times, "You've got to die." Eventually the prosecutor wrested the revolver from the prisoner, and with assistance took him to the police station. The prisoner was convicted. It was held by the Court that there was evidence for the jury.

In delivering his judgment Kennedy, J., said: "It is always necessary that the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence" (p. 103). And, referring to what it was necessary to prove, Darling, J., said that two matters had to be present to constitute the crime: "First, there must be evidence of the physical act, the attempt to discharge the firearm. That can be proved by evidence of what the man was doing with his hands, holding a pistol and so on; and if he did these acts which, if not prevented, he would do in order to discharge a pistol, then there is evidence of an attempt" (pp. 103-4.)

In *Regina v. Taylor* (1859), 1 F. & F. 511, the prisoner was indicted for that he "by a certain overt act, to wit, by then and there lighting a certain match . . . near to a certain stack of corn . . . unlawfully . . . did attempt to set fire" to the stack of corn. It was proved that the prisoner called at the prosecutor's house and applied for work; upon refusal he asked for a shilling, and, being again refused, became very

abusive, and threatened "to burn up" the prosecutor. He was then watched by the prosecutor and his servant, and seen to go to a neighbouring stack, and, kneeling down close to it, to strike a lucifer match; but, discovering that he was watched, he blew out the match, and went away, and no part of the stack was burnt. Chief Baron Pollock in charging the jury told them that if they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, in his opinion that was in law a sufficient attempt to set fire to the stack, within the meaning of the statute, to render the prisoner liable to be found guilty. That it was clear that every act committed by a person with the view of committing the felonies mentioned in the statute was not within it; as, for instance, buying a box of lucifer matches with intent to set fire to a house; that the act must be one immediately and directly tending to the execution of the principal crime; and that, if two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment such as that against the prisoner.

The facts in the case at bar are thus stated in the case:—

"From information received by them, the military authorities at Welland suspected the defendant of assisting the enemy by conveying Austrian subjects across the Niagara river to the United States after the war broke out, and about the 14th November, 1914, they sent one Jack Bugarski, who was in their employment, to the defendant. The said Bugarski represented to the defendant that he was a foreman on the Welland canal, and that sixty or seventy Austrian reservists under him, who were under suspicion in the country, were anxious to get to Buffalo for the purpose of reporting to the Austrian consul there, and of saving their property in Austria from confiscation. The defendant, after several interviews, finally agreed with Bugarski that he would take these men across for \$10 each, and arranged with Bugarski that he would bring some of the men to his house on the Niagara river on an appointed night, when he, the defendant, would row them across to the United States.

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“Bugarski, at the appointed time, appeared at the defendant's house with four Austrian reservists, and met the defendant as arranged. The defendant stated that the weather was too bad, and that he would have to defer taking the men across the river until the wind abated, and he conducted the men to an old house on the property, where he agreed to keep them until that time.

“The defendant provided the men with a light to be used in the house, and cautioned them to make no noise and to place the light so that it would not be observed from without. He was paid \$10 by Bugarski for each of the men in payment of his charge for taking them across the river. This payment was made in the house, in the presence of the men, by Bugarski. After the payment, Bugarski and the defendant left the house, locking the men in.

“After he left the building, he concealed the \$10 received by him from Bugarski in an old cutter, and after he had concealed it he was arrested by the military authorities, who had men posted in the vicinity for the purpose of intercepting him on his way across the river. When he was arrested, he admitted that he had received the money, and told the authorities where he had concealed it.”

There was evidence that the prisoner intended to take the Austrians across the river to the United States for the purpose mentioned in the indictment, and evidence from which the jury might properly conclude that, if the prisoner had not been arrested, he would have carried out that intention.

The bargain he made with Bugarski, and his acts with reference to the four men who were brought to the farm for the ostensible purpose of being taken over to the United States, were overt acts forming part of a series of acts which, if not interrupted, would have ended in the commission of the actual offence. As in the case of *Rex v. Linneker* the fact that the prisoner had not drawn the trigger did not prevent what he did from constituting an attempt, so in this case the fact that the prisoner had not begun the transportation of the men did not prevent what he had done with a view to carrying out his in-

tention from constituting an attempt to commit the offence with which he was charged.

Since the argument, the stated case has been amended by making the evidence part of it, and we are now in a position to deal with a further contention on the part of the appellant, which was not open on the case as at first stated.

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It appears from the evidence that the men whom the prisoner is charged with having incited and assisted had no intention of leaving Canada for the purposes mentioned in the indictment or for any other purpose, and that they had no knowledge that the purpose of their being brought to the prisoner's premises was that he might take them across the river for any such purpose or at all. The whole affair was a sham, arranged by the military authorities for the purpose of confirming the suspicions they had that the prisoner was engaged in the work of assisting Austrians to cross the river with the view of their going to Europe to assist the enemy, and, as they thought, enabling them to arrest him *flagrante delicto*. The prisoner, no doubt, thought that the thing was real, especially when he received \$10 in cash for each of the men that were brought to him.

There was no evidence that the prisoner incited the men or any of them to leave Canada, and I am unable to understand how it can be said that the prisoner assisted them to leave or attempted to do so. Surely to assist another involves the idea of a desire, or at least a willingness, to be assisted on the part of the person who is said to have been assisted; and there was neither, according to the uncontradicted testimony, and that, too, elicited from the witnesses called on the part of the prosecution.

I am, for this reason, of opinion that there was no evidence proper to be submitted to the jury of the offence charged in the indictment, or of an attempt to commit it.

*Conviction quashed.*

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[APPELLATE DIVISION.]

July 12.

## RE SCHOOLEY AND LAKE ERIE AND NORTHERN R.W. Co.

*Railway—Expropriation of Land—Compensation—Arbitration and Award—  
“Special Value” of Land for Business Carried on—Business Disturbance—“Special Adaptability”—Elements of Damage.*

Arbitrators, in fixing the amount to be paid as compensation to land-owners for land expropriated by a railway company for the purposes of their railway, allowed \$20,000 “for the extra cost of harvesting ice in any other place in the city of B., or what may be termed ‘special adaptability interest’ in the land expropriated”—the land bordering on a river and being used by the owners for the purposes of their business of cutting and selling ice. The arbitrators apparently arrived at the sum of \$20,000 by estimating the annual loss which would be caused by doing business elsewhere for an arbitrary period of ten years:—

*Held*, upon appeal from the award, that the \$20,000 represented the special value of the lands expropriated and damages for disturbance to business; and, as the matters dealt with by the arbitrators were proper to be considered, and there was no discoverable error in principle, the award should stand, although the arbitrators’ method of calculation might not be the most usual or best to be adopted.

It was of no consequence whether the land-owners carried on their business at a profit or a loss, if that profit was reduced or the loss increased by the compulsory removal.

*Seemle*, that the better method was to arrive at the value of the land, including in that the element of fitness for the business carried on upon it, and then to allow for disturbance.

“Special value” refers to the present use of land, and means its added worth to the owners for the actual and particular use to which it is being put, and for which it is specially fit; while “special or exceptional adaptability” refers to an apparent but future use to which the property may be, but is not now, put, and for which it is particularly adapted.

*Pastoral Finance Association Limited v. The Minister*, [1914] A.C. 1083, applied.

APPEAL by the railway company from an award of three arbitrators fixing at \$49,000 the money-compensation to be paid to the claimants for lands in the city of Brantford taken for the railway. The lands bordered on the Grand river, and had upon them buildings, machinery, and plant used in connection with the business of cutting and selling ice.

The appeal was in regard to two items: (1) “Sawdust in ice-house for covering ice, \$800;” and (2) “for the extra cost of harvesting ice in any other place in the city of Brantford, or what may be termed special adaptability interest in the lands expropriated by the railway company, \$20,000.”

May 3. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*W. S. Brewster*, K.C., for the appellants. The award was excessive, and the arbitrators erred in principle in arriving at the item of \$20,000 allowed for special adaptability. They allowed this sum for the increased cost of carrying on the business at another place, and arrived at the figure by allowing \$2,000 a year for the arbitrary period of ten years. The proper method would have been to allow a certain amount for special value for the land due to its suitability for the ice business, and damages for disturbance of that business: *Re Meyer and City of Toronto* (1914), 30 O.L.R. 426; *Cedars Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569, at p. 576; *Pastoral Finance Association Limited v. The Minister*, [1914] A.C. 1083; *In re Countess Ossalinsky and Manchester Corporation* (1883), Browne and Allan's Law of Compensation, 2nd ed., p. 659. The item of \$800 for sawdust in the ice-house for covering the ice should not have been allowed, as the ice covered by it on the date of expropriation must have melted away.

*M. K. Cowan*, K.C., and *J. W. Pickup*, for the claimants, respondents. The award was reasonable, and there was no error in principle, though the arbitrators might perhaps have expressed their findings differently. The \$20,000 which they say is for future cost, the cost of carrying on the business elsewhere, the exceptional adaptability of the premises, represents the special value of the land expropriated and damages for disturbance to business. Special adaptability is an accepted element of consideration: *Cripps on Compensation*, 4th ed., p. 108. As to the \$800 for sawdust, the arbitrators arrived at that figure on the evidence, and it should be allowed to stand.

*Brewster*, in reply.

July 12. HODGINS, J.A.:—Appeal by the railway company from the award of three arbitrators made on the 12th day of February, 1915. The amount fixed as the compensation is \$49,000, made up as follows:—

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RE	Water street lands .....	4,620.00
SCHOOLEY	Water street buildings .....	3,500.00
AND	Greenwich street lands .....	10,560.00
LAKE ERIE	Greenwich street buildings .....	8,400.00
AND	Sawdust in walls .....	445.00
NORTHERN	Sawdust in ice-house for covering ice .....	800.00
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Total of above .....\$29,000.00

Then in addition also for the extra cost of harvesting ice in any other place in the city of Brantford, or what may be termed special adaptability interest in the lands expropriated by the railway company ..... 20,000.00

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Making a grand total of ..\$49,000.00

The only serious appeal is as to the items of \$800 for sawdust and \$20,000 for "extra cost of harvesting ice in any other place in the city of Brantford, or what may be termed special adaptability interest in the lands expropriated."

The award is concurred in by all three arbitrators, but the railway company's appointee has given some reasons which explain what he calls his "paradoxical position."

The point of difference appears to be as to the method of arriving at the special value attributable to the property on account of its suitability for the business of the ice company, carried on by the respondents there; the fact of suitability being agreed upon by all.

The majority of the arbitrators have dealt with the question thus: "We found also that these lands were especially adapted for the ice business, reducing the handling and storing of ice to a minimum of expense, and making it much less expensive than it can be done for at the premises to which the claimants propose removing, or indeed in any other premises in the city of Brantford that was mentioned or pointed out to us, as we find and believe. . . . This property being now taken away, it cannot be duplicated, as we find, in the city of Brantford. In any

other place there will be the extra cost of loading, hauling, unloading, and planing. The evidence as to the cost of this is to some extent problematic, but we believe and find it will be very considerable. Evidence was given to shew that the extra expense of procuring, handling, and hauling the ice to what is known as the King property, which the claimants propose procuring, would be an additional \$4,000 a year—that is to say: to procure the present supply obtained by the company for the city of Brantford, increasing of course with any increase in consumption and business. We are not prepared to hold that these figures are correct, but we do find that that extra expense would be at the very least \$2,000 a year, and probably more, increasing in the same way with any future increase of business, if any. This would necessarily result in large diminution of profits, and perhaps a total extinction of the business. We were strongly urged that it would be just to the claimants to capitalise this extra expense and give them the benefit of the whole capitalisation. This we considered, but thought it unfair, there being so many contingent and uncertain elements in the future to be taken into our consideration. For this element of future cost, the increase of cost of carrying on the business, or, as we choose to call it, the ‘exceptional adaptability’ of the present premises for its purpose, we have awarded the claimants the sum of \$20,000, in addition to the intrinsic value of the properties as above set out.”

The third arbitrator treats the matter in this way: “While I agreed with the other arbitrators that the Greenwich street property was especially adapted for the cutting and harvesting of ice from the Grand river, as stated in the reasons given by my co-arbitrators, yet on the other hand I contended that the true measure of damages for which the owner should be compensated is not necessarily the increased cost to him of carrying on business of the same capacity or equal to any future demand at any other site in the city of Brantford, but that the railway company had the option of either compensating him for such increased cost, as set forth in the award, or compensating him for the extinguishment or obliteration of the business so far as such business was incidental to the land expropriated. The

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owner gave a great deal of evidence to prove that it would cost \$4,000 more to carry on business at the Grand Trunk or King site in the city of Brantford, which site the owner had selected as his new site, as compared with the cost of carrying on business at the Greenwich street site. . . . Here, the arbitrators had the benefit of Mr. Magee's practical knowledge, and he placed the figure of such extra cost, after making due allowance, at \$2,000 a year, which is the figure mentioned in the award; and, if this is the proper method of arriving at the compensation to which the owner is entitled, then I agree that this figure is correct. Taking into consideration the uncertainties and exigencies of the ice business, the arbitrators unanimously arrived at a 10-years' basis, or, in other words, \$20,000, as a fair and reasonable allowance to the owner to cover the increased cost of carrying on business at the King or Grand Trunk Railway site. In agreeing with this figure, I expressly reserved my right to contend that the proper allowance would be an allowance based on the damage sustained by the owner, arising from the extinguishment or obliteration of the business as incidental to the land. In dealing with the case from this standpoint, I endeavoured to ascertain the proper yearly profits of the business."

The arbitrator then proceeds to ascertain the yearly profits, and concludes that they do not amount to more than \$1,000 per annum after making the deductions he sets out. He then continues: "Taking this on the same basis as allowed in connection with the \$2,000 item, being the increased cost of carrying on business elsewhere, being a ten-year basis; this would make the allowance to which Mr. Schooley is entitled in connection with the total extinguishment or obliteration of the business as \$10,000 as against \$20,000 mentioned in the award."

It is perhaps to be regretted that the arbitrators did not adopt the much simpler and clearer method followed by the Official Arbitrator in Toronto in the case of *Re Meyer and City of Toronto* (1914), 30 O.L.R. 426. This was to arrive at the value of the land, including in that the element of fitness for the business carried on upon it, and then to allow for disturbance. But it is impossible to read the reasons I have quoted without feeling sure that the \$20,000 allowed was

intended to cover this special value as well as business disturbance. For the sake of clearness it may be mentioned that "special value" refers to the present use of land, and means its added worth to the owners for the actual and particular use to which it is being put, and for which it is specially fit; while "special or exceptional adaptability" refers to an apparent but future use to which the property may be, but is not now, put, and for which it is particularly adapted. The amount allowed by the arbitrators should be dealt with, as it is obviously intended to be treated, i.e., as allowed for special value, due to its suitability for the ice business, to which it is being devoted, and damages for disturbance to that business, and not necessarily as it is expressed in the award. See remarks of Lord Watson in *Commissioners of Inland Revenue v. Glasgow and South-Western R.W. Co.* (1887), 12 App. Cas. 315, 323.

It is impossible to say that the added cost of handling business elsewhere is not a proper element in, and in some cases the only way of, estimating the additional amount which a man would give rather than lose the property as a site for his business. Indeed, if the arbitrators had considered this, and added their computation of the result to the ordinary value of the land, there could be no objection to the award on principle. It is the apparent allowance of the annual loss of doing business elsewhere for an arbitrary period of ten years that has created the difficulty, and it is only by treating the amount as including special value as well as business disturbance that the amount can be supported. But the arbitrators have avoided the error pointed out by Lord Moulton in *Pastoral Finance Association Limited v. The Minister*, [1914] A.C. 1083, and have not capitalised the loss. The principle of that case seems entirely applicable. There the prospective savings and additional profits, while not to be capitalised, were not excluded as an element in arriving at the special value, but were treated as proper material to be considered. The estimated loss or extra expense by reason of operating on other premises stands in exactly the same relation to the present problem as the possible additional savings and profits upon the contemplated property in the case just cited.

In regard to the reasoning of the third arbitrator, I am un-

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able to understand how the exact net profits of the present ice business carried on by the respondents have anything to do with this question. Whether those yearly profits average \$5,853, as stated by the respondents, or only \$1,000, as brought out by the third arbitrator, makes little difference. Whether one set of figures or the other is adopted, the loss of operating elsewhere would remain constant and would represent an element of value to be added to the present premises, and it is of no consequence whether the respondents carry on their business at a profit or at a loss, if that profit is reduced or the loss is increased by the compulsory removal. This is pointed out in the *Burrow* case,\* cited in the case of *Re Brantford Golf and Country Club and Lake Erie and Northern R.W. Co.* (1914), 32 O.L.R. 141.

The amount of \$20,000 seems large, having regard to the figures awarded for the land and buildings in this case. But there seems to be no basis on which it can fairly be reduced, if, as I think was intended, it represents the special value of the land expropriated and damages for disturbance to business. The third arbitrator bears testimony to the technical knowledge, experience, and fairness of Mr. Magee, one of the arbitrators, and the amount fixed is apparently due to his influence with his brother arbitrators. Besides this, the third arbitrator is satisfied with the amount unless a different principle can be adopted. As the matters dealt with by the arbitrators were proper to be considered, and there is no discoverable error in principle, the award should stand, although the method of calculation may not be the most usual or best to be adopted. The cases of *Chertsey Union Assessment Commission v. Metropolitan Water Board* (1914), 78 J.P. 436, and *New River Co. v. Hertford Union*, [1902] 2 K.B. 597, may be looked at as examples of similar special value.

The item of \$800 for sawdust cannot be supported and should be disallowed. It was faintly defended, and if, as stated, the respondents are still carrying on the business on the same premises, the ice there on the expropriation date should have

\**The Queen v. Burrow*, *Metropolitan R.W. Co. v. Burrow* (1884), *London Times*, 24th January and 22nd November, 1884, Boyle and Waghorn on Compensation, p. 1052, Hudson on Compensation, p. 1521.

long ago disappeared. With this deduction, the award should be affirmed and the appeal dismissed with costs.

GARROW, J.A., concurred.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., agreed in the result.

*Appeal dismissed.*

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MACKELL V. OTTAWA SEPARATE SCHOOL TRUSTEES.

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July 12.

*Constitutional Law—Roman Catholic Separate Schools—Regulations of Department of Education—Intra Vires—5 Geo. V. ch. 45 (O.)—B.N.A. Act, sec. 93, sub-sec. 1—"Right or Privilege"—"Class of Persons"—"Have by Law"—Use of French Language in Schools—Treaty Rights—Natural Rights—26 Vict. ch. 5—B.N.A. Act, sec. 133—Powers of Provincial Legislature.*

The validity of Regulations 17 (1912 and 1913) of the Department of Education is established by the Ontario Act 5 Geo. V. ch. 45, "An Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," unless the Ontario legislation is itself *ultra vires*.

When the British North America Act was passed, the law which provided for the establishment and maintenance of Roman Catholic Separate Schools in Upper Canada was the Act of 1863, 26 Vict. ch. 5; the rights and privileges of the Roman Catholics of the Province with respect to Separate Schools were those, and those only, which they possessed under the Act of 1863; the purpose of sub-sec. 1 of sec. 93 of the British North America Act was to prevent, as far as the Province of Ontario was concerned, the enactment of any law relating to education which would prejudicially affect those rights or privileges; and, subject to that limitation, the legislative authority of the Provincial Legislature as to education is as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow.

Only rights or privileges which exist as legal right or privileges ("have by law") are preserved by sec. 93, sub-sec. 1.

*City of Winnipeg v. Barrett*, [1892] A.C. 445, followed.

The right to use the French language in the Separate Schools of the Province of Ontario has not been guaranteed by treaty or otherwise to the French-speaking people, nor is it a natural right pertaining to them which (as argued) the Legislature is powerless to impair or destroy; if the right had been guaranteed by treaty, the new constitution for Canada which was provided by the British North America Act would have abrogated the right, except in so far, if at all, as granted by it.

Section 133 of the British North America Act, giving the right to use the French language in Parliament and in the Legislature and Courts of the Province of Quebec, indicates that, except as to the matters dealt with by the section, the plenary power of the Legislature, within the ambit of its legislative authority, was to be unlimited as to what it should ordain as to the use of the French language.

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*Per GARROW, J.A.*:—The "right or privilege" protected by the law is not one concerning language, but the right or privilege of having religious instruction imparted in the Separate Schools. The Regulations attacked, which deal only with language, cannot prejudicially or in any way affect that right or privilege—which apparently is left exactly as it was established in 1863.

Judgment of LENNOX, J., 32 O.L.R. 245, affirmed.

APPEAL by the defendants from the judgment of LENNOX, J., 32 O.L.R. 245.

April 26 and 27. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*N. A. Belcourt, K.C., A. C. McMaster, and J. H. Fraser*, for the appellants, argued that Regulation No. 17 of the Department of Education was beyond the scope of its powers, and that, even if it were authorised by provincial legislation, such legislation was *ultra vires*. Reference was made to the Quebec Act of 1774, and to the provisions of the British North America Act, sec. 93, sub-secs. 1, 3, and 4, and sec. 133; *Grattan v. Ottawa Separate School Trustees* (1904), 8 O.L.R. 135, 9 O.L.R. 433; *Brothers of the Christian Schools v. Minister of Education for Ontario*, [1907] A.C. 69; Halsbury's Laws of England, vol. 27, pp. 149, 151, 154; *Forbes v. Cochrane* (1824), 2 B. & C. 448, 471; Houston's Constitutional Documents of Canada, pp. 79, 82; *Campbell v. Hall* (1774), 1 Cowp. 204, where *Calvin's Case*, 4 Coke 1, is cited.

*W. N. Tilley*, for the plaintiffs, was heard only as to the legislation being *ultra vires*. He discussed the interpretation and effect of sec. 93, sub-secs. 1 and 3.

*McGregor Young, K.C.*, for the Minister of Education, referred to *City of Winnipeg v. Barrett*, [1892] A.C. 445, 5 Cart. 32, 90, 92, 156-8; *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202; *Maher v. Town of Portland* (1874), 2 Cart. 486 (note), Wheeler's Confederation Law of Canada, pp. 338, 350; *Belleville Separate School Trustees v. Grainger* (1878), 25 Gr. 570, 579; *In re Roman Catholic Separate Schools* (1889), 18 O.R. 606; *Arthur Separate School Trustees v. Township of Arthur* (1890), 21 O.R. 60; *Barrett v. City of Winnipeg* (1891), 19 S.C.R. 374, 421; *Fearon v. Mitchell* (1872), L.R. 7 Q.B. 690;

Houston, *op. cit.*, p. 93; *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co.*, [1914] A.C. 237, 253.

*Belcourt*, in reply, argued that the New Brunswick and Manitoba cases were not applicable in this Court.

July 12. MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment dated the 17th December, 1914, which was directed to be entered by Lennox, J., after the trial of the action before him, sitting without a jury at Ottawa: 32 O.L.R. 245.

The appellants attack the validity of Regulation 17 of the Department of Education, upon two grounds: (1) that it is *ultra vires* the Department of Education; and (2) that, if authorised by provincial legislation, the legislation itself is *ultra vires*.

The first objection is no longer open to the appellants, because of the declaratory Act passed at the last session of the Provincial Legislature, intituled "An Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," 5 Geo. V. ch. 45.

The preamble of the Act recites that: "Whereas an action is now pending in the Supreme Court of Ontario in which one Mackell and other supporters of the Separate Schools in the City of Ottawa are plaintiffs, and the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa is defendant, in which action the said Board is contending that Regulations number 17 of the year 1912 and number 17 of the year 1913 made by the Minister of Education were *ultra vires* the Province under the British North America Act, and that the Province had no legislative authority under the said Act to regulate the use of French as a language of instruction and communication in the Public and Separate Schools of the Province, or the teaching therein of the French language; and whereas the said Board has failed to open the schools under its charge at the time appointed by law, and to provide or pay qualified teachers for the said schools, and has threatened at

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different times to close the said schools and to dismiss the qualified teachers duly engaged for the same."

And it is enacted by the first section as follows: "1. It is hereby declared that, subject to the said question of the legislative authority of the Province under the British North America Act, the said regulations were duly made and approved under the authority of the Department of Education Act and became binding according to their terms and provisions upon the said Board and the schools under its control."

In support of the second ground of objection it was argued that the legislation is *ultra vires* because it prejudicially affects a right or privilege of the French-speaking people, contrary to the provisions of sec. 93 of the British North America Act.

Prior to the passing of that Act, there had been bitter controversies in this Province upon the subject of Roman Catholic Separate Schools, and these had been brought to a conclusion by the passing in 1863 of an Act intituled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools" (26 Vict. ch. 5).

The preamble to that Act is as follows: "Whereas it is just and proper to restore to Roman Catholics in Upper Canada certain rights which they formerly enjoyed in respect to Separate Schools, and to bring the provisions of the Law respecting Separate Schools more in harmony with the provisions of the Law respecting Common Schools." And, by sec. 1, secs. 18 to 36 of ch. 65 of the Consolidated Statutes of Upper Canada, which dealt with the establishment and maintenance of Roman Catholic Separate Schools, were repealed, and certain other provisions were substituted for them. By sec. 26, it was provided that "the Roman Catholic Separate Schools (with their registers) shall be subject to such inspection as may be directed from time to time by the Chief Superintendent of Education, and shall be subject also to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada."

The appointment of the Council of Public Instruction for Upper Canada was provided for by sec. 114 of the Consoli-

dated Statutes of Upper Canada, ch. 64, and it exercised its duties subject to all lawful orders and directions from time to time issued by the Governor.

By 39 Vict. ch. 16, sec. 1, the functions of the Council of Public Instruction were suspended, and all the powers and duties which it then possessed or might exercise by virtue of any Act in that behalf were devolved upon the Education Department, which was to consist of the Executive Council, or a committee of it appointed by the Lieutenant-Governor; and all the functions and duties of the Chief Superintendent of Education were vested in one of the Executive Council, to be nominated by the Lieutenant-Governor and to be designated "Minister of Education;" and whenever in any statute, by-law, regulation, deed, proceeding, matter or thing, the term "Council of Public Instruction," or "Chief Superintendent of Education" (as the case might be), or to the like signification, respectively occurred, the same were to be construed and have effect as if the term "Education Department" or "Minister of Education" was substituted therefor respectively; and the law has so remained down to the present time.

When the Separate Schools Act was revised in 1877, by ch. 206, R.S.O. 1877, the provisions of the Act of 1863 were re-enacted with the changes rendered necessary by 39 Vict. ch. 16.

When the British North America Act was passed, the law which provided for the establishment and maintenance of Roman Catholic Separate Schools was the Act of 1863, and the rights and privileges of the Roman Catholics of the Province with respect to Separate Schools were those, and in my opinion those only, which they possessed under the Act of 1863; and the purpose of sub-sec. 1 of sec. 93 was to prevent, so far as the Province of Ontario was concerned, the enactment of any law relating to education which would prejudicially affect these rights or privileges.

The Separate Schools Act, besides providing for the establishment and maintenance of Roman Catholic Separate Schools, also provided for the establishment and maintenance of Separate Schools for coloured people and of Separate Schools for

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Protestants, and the principle applied in all cases was that these Separate Schools were to be brought into existence by the voluntary action of the respective classes, Protestants, Roman Catholics, and coloured people, which desired that they should be established.

Save only in the case of schools for coloured people, there is not to be found in the legislation prior to Confederation any recognition of the right to Separate Schools based upon linguistic or racial differences, or upon anything but religious differences.

The basic principle upon which the Separate Schools were founded was that Roman Catholics should not be required to contribute to the support of Common or Public Schools if they chose to establish Separate Schools for the education of Roman Catholic children, and that, in the event of their doing so, these schools should share in the legislative grants for Common or Public School education, and that for their support the trustees of the schools should have power to impose, levy, and collect school rates or subscriptions from persons sending children to or subscribing towards the support of the schools, and that they should have all the powers in respect of their schools that trustees of Common Schools have and possess under the Acts relating to Common Schools. It was only persons who gave notice that they were Roman Catholics and supporters of Separate Schools that were exempted from the payment of rates imposed for the support of Common Schools, and the right to withdraw their support from the Separate Schools was given to persons who had given this notice but desired to withdraw their support.

It seems to me quite plain, therefore, that the effect of subsec. 1 of sec. 93, which provides that "nothing in any such law" (i.e., a Provincial law in relation to education) "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union," is, as far as the Province of Ontario is concerned, to restrict the exclusive authority to make laws in relation to education to the extent of prohibiting the making of any such

law which would prejudicially affect the rights or privileges with respect to denominational schools which are conferred by the Act of 1863, and to that extent only; and that, subject to that limitation, the legislative authority of the Province as to education is "as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow:" *per* Sir Barnes Peacock in *Hodge v. The Queen* (1883), 9 App. Cas. 117, 132.

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That it is only rights or privileges which exist as legal rights or privileges ("have by law") that are preserved is plain, and it was so held by the Judicial Committee in *City of Winnipeg v. Barrett*, [1892] A.C. 445. See also *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202.

I am unable to find anything which supports the contention of the learned counsel for the appellants that the right to use the French language in the Separate Schools of the Province was guaranteed by treaty or otherwise to the French-speaking people, nor am I able to appreciate the contention that that is a natural right pertaining to them which the Legislature is powerless to impair or destroy.

However, even if it had been shewn that, by the terms of the treaty which resulted in the cession of Quebec to Great Britain, this right had been guaranteed to the French-speaking people of the ceded territory, the new constitution for Canada which was provided by the British North America Act would have abrogated those rights except in so far, if at all, as they are granted by it.

The British North America Act was the result of long deliberation and careful consideration by representatives of the various Provinces which were by it united into one Dominion, and great care was taken to provide for preserving the rights which religious minorities then possessed in matters relating to education. The use of the French language was also a question considered and dealt with; and, by sec. 133, the right was given to use that language in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec, and by any person or in any pleading or process in or issuing from



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any Court of Canada established under "this Act and in or from all or any of the Courts of Quebec."

It is inconceivable to me that the framers of the resolutions on which the Act was based would have embodied in them these provisions if they had any idea that the French-speaking people already enjoyed the greater rights which, according to the contention of the appellants' counsel, they possessed.

It was argued by counsel for the appellants that sec. 133 supports his contention; but that is clearly not so, I think. So far from supporting it, an intention is indicated that, except as to the matters dealt with by the section, the plenary power of the Legislature, within the ambit of its legislative authority, was to be unlimited as to what it should ordain as to the use of the French language.

The judgment of the learned trial Judge is, in my opinion, right, and should be affirmed, and the appeal should be dismissed with costs.

GARROW, J.A.:—Appeal by the defendants from the judgment of Lennox, J., in favour of the plaintiffs.

The action is brought by the plaintiff Mackell, suing on behalf of himself and other ratepayers of the City of Ottawa, supporters of Separate Schools for Roman Catholics, against the defendant, for an injunction restraining the defendant from employing and paying unqualified teachers, and from otherwise disregarding, in the management of the schools under its control, the regulations of the Department of Education applicable to such schools.

Lennox, J., held in favour of the plaintiffs. His judgment is reported in 32 O.L.R. 245.

No serious attempt was made before us to uphold or justify the conduct of the defendant as to the great bulk of the matters complained of. The address of the learned counsel for the defendant was devoted almost entirely to maintaining an alleged right to the use in the Separate Schools of the Province of the French language, and to an attack upon the "Circular of Instructions" set out at pp. 252 *et seq.* of the report in 32 O.L.R., which regulates and limits the use of that language as a language

of instruction and communication in such schools, because, as they contended, it prejudicially affects the rights and privileges which the French-speaking inhabitants have by law, with respect to denominational schools, guaranteed by sec. 93 of the British North America Act, and that it is therefore *ultra vires*.

With questions of policy we have here nothing to do. Nor do we sit to determine cases based only upon natural justice, to which the learned counsel appealed. This is a Court of law; and a right asserted and claimed before us, as before any other of our Courts of law, must shew for its supporting foundation something in the substantive law of the Province, or the claim must fail.

These questions of language, like questions of religion, are always delicate to handle. Susceptibilities as to them are keen. Temper is easily aroused, and reason and logic too often are left far behind. It is a perfectly natural thing that those of French descent should love their noble language, and even passionately desire to promote, as far as reasonably possible, its perpetuation here. One may even respect a similar sentiment on the part of the Germans, the Italians, and the others settled among us to whom the English is a foreign tongue. But it is not to be ignored or forgotten that, while all are tolerated, the official language of this Province, as of the Empire, is English, and that the official use of any other language is in the nature of a concession and not of a right. This is, I think, well, and indeed in my opinion conclusively, illustrated by the provisions of sec. 133 of the British North America Act, which says: "Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both these languages shall be used in the respective records and journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec."

The statute contains no provision upon the subject of the language to be used in any of the other Provinces which were

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united under that Act. Evidently none was considered necessary, because, in the absence of a special provision to the contrary, English, the language of the Empire, would naturally be the official language of the Province. And, if this conclusion is contested, the maxim "*expressio unius est exclusio alterius*" may be, I think, successfully invoked upon the question of construction, to exclude as a right the official use of French in the Province of Ontario.

The "Circular of Instructions," it will be observed, applies in terms to both Public and Separate Schools. No complaint is made concerning its application to the former—a weakness, it seems to me, in the argument for the use of French, if the right is, as was practically claimed, an inherent one. Both classes of schools have much in common. Both are supported by rates and receive grants from the public purse, and both are subject to visitation, to inspection, and to regulation by the Department; the only really substantial distinguishing characteristic being that in the Separate School there is the "right or privilege" of having religious instruction, while the public school is non-sectarian.

The general control of the Department, including the power to pass regulations affecting Separate Schools, cannot be successfully disputed. The Roman Catholic Separate Schools Act of 1863, the foundation although not the origin of such schools, is intitled "An Act to restore to Roman Catholics in Upper Canada" (now Ontario) "certain rights in respect to Separate Schools." The preamble is: "Whereas it is just and proper to restore to Roman Catholics in Upper Canada certain rights which they formerly enjoyed in respect to Separate Schools, and to bring the provisions of the Law respecting Separate Schools more in harmony with the provisions of the Law respecting Common Schools." Section 13 provides that teachers under the Separate Schools Act shall be subject to the same examinations and receive their certificates of qualification in the same manner as Common School teachers generally; provided that persons qualified by law as teachers, either in Upper or Lower Canada, should be considered qualified teachers for the purposes of the

Act. See *Brothers of the Christian Schools v. Minister of Education for Ontario*, [1907] A.C. 69, where a question arising upon this proviso was considered. Section 22 provides that a return shall be made to the Chief Superintendent of the names of the children attending the school, and the average attendance during the next preceding six months. By sec. 23, Judges, Members of the Legislature, heads of municipal councils, the Chief Superintendent and Local Superintendent of Common Schools, and Clergymen of the Roman Catholic Church, shall be visitors. And finally sec. 26, which declares that "the Roman Catholic Separate Schools (with their registers) shall be subject to such inspection as may be directed from time to time by the Chief Superintendent of Education, and shall be subject also to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada."

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Now, while it is doubtless true that many of the supporters of such schools are of French origin, there are also large numbers of other supporters of whom French is not the natural language. And, as far as I can see, neither the one class nor the other has or ever had any "right or privilege" concerning the use in such schools of any language other than English. In other words, the "right or privilege" protected by the law is not one concerning language, but to have what the general community has not, namely, religious instruction imparted in such schools. I therefore quite fail to see how the circular in question, which deals only with language, prejudicially or in any way at all affects that right or privilege, which apparently is left exactly as it was established in 1863.

We were, it is true, referred to some rather hazy instances in the early days when a more extensive use of the French language may perhaps have been customary in schools in French settlements, just as German was used in German settlements at about the same time. These instances, however, fall very far short of proving or establishing "a right or privilege which any class of persons have by law" in respect of these languages as against the general use of English. They were evidently in every case mere temporary tolerations, as clearly appears from

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a perusal of the little work by the late Dr. Hodgins, so long the Deputy Superintendent of Education. What is a "right or privilege" in a similar matter was considered in *City of Winnipeg v. Barrett*, [1892] A.C. 445.

I would dismiss the appeal with costs.

MACLAREN, MAGEE, and HODGINS, JJ.A., concurred.

*Appeal dismissed.*

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[APPELLATE DIVISION.]

July 12.

MCDONALD V. LANCASTER SEPARATE SCHOOL TRUSTEES.

*Schools—Roman Catholic Separate School not Designated as English-French—Use of French as Language of Instruction—Regulations of Department of Education—Breach—Injunction.*

The judgment of FALCONBRIDGE, C.J.K.B., 31 O.L.R. 360, restraining the defendants from using or allowing the use of French as the language of instruction or communication in a Roman Catholic Separate School, so long as the same should not be permissible under the Regulations of the Department of Education, was affirmed.

It was held, that the breach of the Regulations which had taken place was the teaching of French, either under clause 3 (1) or 4 of Instruction 17 of 1913, without the fulfilment of the conditions embodied in them, and in a school not designated by the Minister of Education as an English-French school.

APPEAL by the defendants the Board of Trustees of Roman Catholic Separate School Section No. 14, Lancaster, and the individual trustees, from the judgment of FALCONBRIDGE, C.J. K.B., 31 O.L.R. 360.

December 8, 1914. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

N. A. Belcourt, K.C., A. C. McMaster, and J. H. Fraser, for the appellants. Assuming for the purpose of this argument that the regulations of the Department of Education are *intra vires*, under sec. 15 of the "Regulations and Courses of Study of the Public Schools, 1911," French is authorised to be taught as a subject of study. The learned trial Judge did not deal properly with this matter, owing to a confusion between this

sec. 15 and Instruction 17 of the Regulations of 1912 and 1913. Unless sec. 15 has been violated, there is no ground for this action, and Instruction 17 does not apply to this case. Granting that the appointment of Miss Sénécal was illegal, she should not be compelled to pay any damages or costs. The Court should vary the judgment of the learned trial Judge as to costs. [MEREDITH, C.J.O.:—The discretion of the trial Judge as to costs will not be interfered with unless leave to appeal has been given.] No violation of sec. 15 has been shewn on the record. As to the question of whether or not French is a "prevailing language," the evidence is merely the opinion or guess of the parties giving it; and, if our attention is directed to the language used by children at their own home, and not, as the plaintiff suggests, to the language of buying and selling, which is not so good a criterion, it is submitted that the contention of the defendants is borne out. Persons of Scottish extraction living in the locality can't or won't speak French, and it is submitted that where persons of French extraction are in the majority they have a natural right to have their language properly taught.

*J. A. Macdonell*, K.C., for the plaintiff, argued that the question for consideration was not whether or not the French language prevails in the particular school, but whether it prevails in the school section generally. There must be a direction by the parents or guardians as a condition precedent to teaching the French language to children, and such direction must be taken to refer to these children only, and not to children at large.

*McGregor Young*, K.C., for the Province of Ontario, referred to the distinction between "sections" and "settlements," the latter expression having been used in pre-Confederation times. Only clause 4 of the judgment needs to be considered, and it is not here necessary to discuss sec. 80 of the Separate Schools Act. Then as to sec. 15, it must be remembered that this particular school was never designated as "English-French." French never was a subject of study in this school, and down to Miss Sénécal's time English was the only language of communication. Instruction 17 does not apply here, and it

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is submitted that the regulations according to the plaintiff's view are coherent and workable. The defendants do not profess to rely upon sec. 15, because it is not arguable that that section supports what they have done. As to the question of the prevalence of a language, it may be said that the prevailing language is that which predominates in the totality of social life. The question is one of fact, and has been found in our favour by the learned trial Judge.

*Belcourt*, in reply, argued that Instruction 17 has nothing to do with this case, and that sec. 15 is what must be looked at. The judgment appealed from is predicated on a violation of that section, and such violation has not taken place.

July 12. The judgment of the Court was delivered by HODGINS, J.A.:—Upon the argument of the appeal, counsel for the appellants did not attack that part of the judgment which enjoined the Board of Trustees from continuing to employ Léontine Sénécal as a teacher, so long as she was disqualified under the regulations of the Department of Education, nor the award of damages and costs against those defendants. It was admitted by all parties that the formal judgment should be varied by confining the award of damages and costs, as was evidently the learned trial Judge's intention, to the appealing defendants.

This leaves as the only operative part of the judgment affecting the parties to this appeal, para. 4 thereof, reading as follows: "4. And this Court doth further order and adjudge that all the said defendants and each of them be and they are hereby restrained from using or allowing the use of French as the language of instruction or communication in the said school so long as the same shall not be permissible under the said regulations."

As to this clause it is obvious that, while the regulations stand (and they were not attacked in this case as *ultra vires*), no objection can be taken to its language, nor, in view of the facts, to its propriety, and this was admitted by counsel for the appellants. But both they and the other counsel concerned united in asking that the Court indicate what was, in its opinion,

the particular breach or breaches of the regulations aimed at and the extent of that breach, so that all parties might govern themselves accordingly. In complying with that request, so far as it may properly be done, it should be understood that no sanction is given to the idea that the form of the injunction is otherwise than proper and usual.

The facts are not really in dispute. Miss Sénécal holds a third class certificate, and in her conversation with James E. Jones, the Separate Schools Inspector, she says that he told her, in answer to her inquiry, "if there was any French taught in that school," that "the French lessons were limited to an hour a day and twenty minutes for catechism." Following this, she signed her agreement, and began teaching on the 5th February, 1914. There were then on the register about seventeen pupils of Scotch descent, and about forty-nine of French descent. Of these latter there were "quite a few small children around five, six, or seven years of age," twenty or twenty-five in number, whom Miss Sénécal says she could not teach intelligently without the use of the French language as a language to communicate the ideas to them. She thought from the advertisement she saw that she was to teach French in the schools, and the Inspector, she says, told her that her certificate was all right for an English-French school. She also says that she was supposed to teach French to all the ones that were willing to learn it—to study it—and that the defendant Poirier told her that he wanted French taught in the school to all the classes, and that she had a limited time for it.

The other trustees, according to her, gave her similar directions.

As to the actual instruction, she admits teaching all the classes reading, spelling, and dictation in French for an hour, the little ones not yet learning dictation, and says that she understood that she could take twenty minutes more. All the pupils over ten years of age, according to her, speak broken English, but not freely. Her view is that for four years she can teach French to young children.

Her school register shews that there are four forms, I., II., III., IV.: and from her evidence it appears that in March, 1914,

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the pupils of "English-speaking descent" fell from seventeen to two.

Quite apart, therefore, from any cross-current arising out of the intention and wish of the trustees and of misunderstanding as to the effect of the Inspector's words, it is clear that, deducting the twenty or twenty-five young children, there were forty-one to forty-five pupils, seventeen of Scotch descent and speaking English, and twenty-four to twenty-nine of French parents, to whom Miss Sénécal says she taught reading, spelling, and dictation for an hour in French. She went there with the idea that she was to teach French and that the time allowed for it was an hour, according to the Inspector; and she states that she was supposed to teach French to all that were willing to learn it.

This eliminates the idea of the use of that language as a mere basis of communication of knowledge, except in case of the small children, and makes its employment the normal method of instruction or study for both French and English children in all classes, for the hour named.

This school is not what is known as an English-French school, not having been so designated by the Department of Education. The certificate of Miss Sénécal is an English-French third class certificate, i.e., one authorising its holder to teach in an English-French school. To enable her to teach in a school not so designated, the certificate would need endorsement or validation by the Minister of Education. For the year 1911-12-13 the teachers had been English, not speaking French, and the teaching was all in English. Miss Sénécal was engaged in February, 1914. At that time the regulations of the Department of Education in force, so far as they are applicable, were the regulations of 1911, exhibit 10, and Instruction 17, exhibit 11, dated August, 1913.

This last instruction, by clause 2 thereof, provides that the regulations and courses of study prescribed for the Public Schools, which are not inconsistent with the provisions of this circular, shall hereafter be in force in the English-French schools, Public and Separate (except with regard to religious instruction and exercises).

By the Department of Education Act, R.S.O. 1914, ch. 265 (taken from 9 Edw. VII. ch. 88), "Regulations" mean regulations made by the Minister and approved by the Lieutenant-Governor in Council as provided by that Act. By sec. 4, the Minister has the administration and enforcement of the statutes and regulations respecting Public Schools, Separate Schools, and other Schools therein mentioned. By sec. 5, the Minister may, subject to the provisions of any statute in that behalf, and with the approval of the Lieutenant-Governor in Council, make regulations: (a) "for the establishment, organisation, government, courses of study, and examination of the schools;" (e) "authorising text-books for the use of pupils . . . attending such schools;" (g) "prescribing the qualifications and duties of inspectors, teachers and directors of such schools," etc.; (i) "for granting temporary, interim, special, permanent, and renewed certificates of qualification to teachers."

By sec. 26: "Subject to the provisions of this Act, every power, right and authority now by law vested in or held, had or possessed by the Minister or by the Department of Education in respect to Roman Catholic Separate Schools or to any matter or thing pertaining to or affecting such Separate Schools shall be vested in and held, had and possessed by the Minister."

By sec. 27, regulations and orders in council made under the authority of this Act or of the Acts relating to Public Schools, Separate Schools, or High Schools, shall be laid before the Legislative Assembly forthwith if in session, or within seven days after the opening of its next session. Disapproval by the Assembly in whole or in part nullifies what is not approved of.

By the Separate Schools Act, R.S.O. 1914, ch. 270, sec. 19, five heads of families "resident within any public school section of a township or within a city, town or village," and being Roman Catholics, may convene a public meeting of persons desirous to establish a separate school "therein," i.e., within such public school section. city, town or village. The board of trustees elected become, on delivering notice as directed by the Act, a corporation (sec. 21 (3)). The right to vote for the rural

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separate school trustees seems to be vested in the supporters of the separate school who reside in the section, i.e., the public school section (sec. 27, sub-sec. 7, and see secs. 33, 35). The duties of the trustees of these schools, which are "Separate Schools for Roman Catholics," are (sec. 45 (d)) to "provide adequate accommodation and legally qualified teachers, according to the provisions of this Act and the Regulations, for all children between the ages of five and twenty-one years of the supporters of the schools under the control of the Board;" (m) "exercise all such other powers and perform all such other duties of public school boards as are applicable to the case of separate schools, except as to matters as to which other provision is made by this Act;" (n) "see that every school under its charge is conducted according to this Act and the regulations."

"Regulations" mean those made under the Department of Education Act.

By sec. 48, it is the duty of every teacher to (a) "teach diligently and faithfully all the branches required to be taught in the school according to the terms of his agreement with the board and according to the provisions of this Act and the regulations."

By sec. 78, it is provided that "the schools with their registers shall be subject to such inspection as may be directed by the Minister of Education and shall be subject also to the Regulations."

From the above it appears that the Minister may make Regulations for the government and courses of study of Public and Separate Schools, and that there is a duty expressly laid on Separate School trustees to conduct the Separate Schools according to the Regulations. In Separate Schools the trustees are to exercise all other powers and perform the duties of Public School trustees except where other provision is made by the Separate Schools Act, the teachers are bound to teach according to the Regulations, and the schools are subject to the Regulations.

The Public School Regulations, made under the Public Schools Act, are intended to govern the schools to which sec. 6

of that Act, R.S.O. 1914, ch. 266, applies, viz.: "Every person between the age of five and twenty-one years, except persons whose parents or guardians are separate school supporters, shall have the right to attend some such school" (i.e., free public school) "in the urban municipality or rural school section in which he resides."

A perusal of the "Regulations and Courses of Study of the Public Schools, 1911" (exhibit 10), indicates that their provisions are primarily intended for Public Schools only.

Section 15 of those Regulations is as follows: "15. In school sections where the French or the German language prevails, the trustees may, in addition to the course of study prescribed for Public Schools, require instruction to be given in reading, grammar, and composition, to such pupils as are directed by their parents or guardians to study either of these languages, and in all such cases the authorised text-books in French or German shall be used. But nothing herein contained shall be construed to mean that any of the text-books prescribed for Public Schools shall be set aside because of the use of the authorised text-books in French or German."

Whether this applies to Separate Schools depends on the terms of Instruction 17.

The Instructions numbered 17 in 1912 and 1913 (exhibits 12 and 11 respectively) differ somewhat. In 1912 Instruction 17, for the school year September to June, 1912-13, deals in clause 1, sub-clause 1, with Roman Catholic Separate Schools and English-French Public and Separate Schools; the latter being defined as those in each class "in which French is the language of instruction and communication as limited in 3 (1) below or is a subject of study in Forms I. to IV. as limited in 4 below."

No. 3 (1) is as follows: "Where necessary in the case of French-speaking pupils, French may be used as the language of instruction and communication; but such use of French shall not be continued beyond Form I., excepting during the school year of 1912-13, when it may also be used as the language of instruction and communication in the case of pupils beyond

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Form I. who, owing to previous defective training, are unable to speak and understand the English language."

No. 4 is as follows: "For the school year of 1912-13, in schools where French has hitherto been a subject of study, the Public or the Separate School Board, as the case may be, may provide, under the following conditions, for instruction in French Reading, Grammar, and Composition in Forms I. to IV. (see also provision for Form V. in Public School Regulation 14 (5)), in addition to the subjects prescribed for the Public and Separate Schools."

"(1) Such instruction in French may be taken only by pupils whose parents or guardians direct that they should do so.

"(2) Such instruction in French shall not interfere with the adequacy of the instruction in English, and the provision for such instruction in French in the time-table of the school shall be subject to the approval and direction of the Supervising Inspector, and shall not in any day exceed one hour in each classroom.

"(3) Where, as permitted above for the school year 1912-13, French is a subject of study in a Public or Separate School, the text-books in use during the school year of 1911-12, in French Reading, Grammar, and Composition, shall remain authorised for use during the school year of 1912-1913."

It will be observed that these regulations are specially limited to the school year 1912-1913, and indicate a state of transition during which the modifications provided for in 3 (1) and 4 are to be made in the course of study of the Public and Separate Schools.

In 1913, Instruction 17 deals with the same subject as did that of 1912; but, as the period of transition had apparently expired, clause 1 of 1913 provides for a classification different from that in 1912; that is, the English-French Schools, both Public and Separate, must be "annually designated by the Minister for inspection" under clause 5, and must be schools "in which French is a language of instruction and communication as limited in 3 (1) below."

Clause 3 (1) differs slightly from the corresponding clause of 1912, in that it is not limited to one year, and that the provision for the use of French as the language of instruction and communication by pupils unable to speak and understand the English language is not made to depend upon their "previous defective training."

Clause 2 is as follows: "The Regulations and Courses of Study prescribed for the Public Schools, which are not inconsistent with the provisions of this circular, shall hereafter be in force in the English-French Schools—Public and Separate—with the following modifications: The provisions for religious instruction and exercises in Public Schools shall not apply to Separate Schools, and Separate School Boards may substitute the Canadian Catholic Readers for the Ontario Public School Readers."

It is this clause which permits reference to be made to the Public School Regulations already mentioned.

The result seems to be that sec. 15 and also clauses 3 (1), 3 (2), and 4, of Instruction 17, 1913, must be considered. Clause 3 (1) has already been outlined. The two latter are as follows:—

"3 (2). In the case of French-speaking pupils who are unable to speak and understand the English language well enough for the purposes of instruction and communication, the following provision is hereby made:—

"(a) As soon as the pupil enters the school, he shall begin the study and the use of the English language.

"(b) As soon as the pupil has acquired sufficient facility in the use of the English language, he shall take up in that language the course of study as prescribed for the Public and Separate Schools.

"4. In schools where French has hitherto been a subject of study, the Public or the Separate School Board, as the case may be, may provide, under the following conditions, for instruction in French Reading, Grammar, and Composition in Forms I. to IV." (see also provision for Form V. in Public School Regulation 14 (5).) "in addition to the subjects prescribed for the Public and Separate Schools.

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“(1) Such instruction in French may be taken only by pupils whose parents or guardians direct that they shall do so, and may, notwithstanding 3(1) above, be given in the French language.

“(2) Such instruction in French shall not interfere with the adequacy of the instruction in English, and the provision for such instruction in French in the time-table of the school shall be subject to the approval and direction of the Chief Inspector, and shall not in any day exceed one hour in each class-room, except where the time is increased upon the order of the Chief Inspector.

“(3) Where, as permitted above, French is a subject of study in a Public or a Separate School, the text-books in use during the school year of 1911-1912, in French Reading, Grammar, and Composition remain authorised for use during the school year of 1913-1914.”

By sec. 15 of the Public School Regulations, two conditions must be satisfied: the first is that the French language must prevail in the section; and the second is that the parents or guardians must direct that the pupils study French.

It seems plain that the status of schools which may be English-French schools was intended to be settled temporarily by the 1912 Instructions, which then included schools in which there were pupils unable to speak English, and those who, in schools which had formerly taught French as a study, were directed by their parents or guardians to continue that study. By the Instructions of 1913, that status was changed finally, and unless and until there is a designation by the Minister, the teaching of French cannot take place.

Even if clauses 3(1) and 4 are considered as in force independent of designation, the conditions found in them are unperformed and are not therefore open to the appellants as authority for their action. Clause 3(1) does not permit the use of French beyond Form I., except with the approval of the Chief Inspector, which was not obtained.

Clause 4 only applies where French has hitherto been the subject of study (and that is not the case here, as I have

pointed out), and where the parents or guardians so direct—which is not shewn—and where the Chief Inspector approves—which fact does not appear.

Clause 15 of the Public School Regulations, if invoked under clause 2 of Instruction 17, is inconsistent with the explicit condition of the two clauses first referred to, which to my mind govern the entire situation regarding French teaching.

The breach of the Regulations, therefore, which has, to my mind, taken place, is the teaching of French, either under clause 3(1) or 4, without the fulfilment of the conditions embodied in them, and in a school not designated by the Minister as an English-French school.

I may perhaps be allowed to add that I entirely subscribe to the sentiments expressed by my brother Garrow in the *Mac-kell* case (*ante* at p. 343) with regard to the study of French. That charming language has not been allowed to win its way on its own merits in the education of Ontario children. The fact that its use has been claimed as a right, instead of being permitted to grow and flourish as one of the most graceful and scholarly elements in a thorough education, has been productive of loss to our compatriots of French-Canadian birth instead of a gain. It is to be hoped that in the future a frank recognition of the fact that English is necessarily the essential and paramount medium of instruction and communication in all Ontario schools, will permit the more generous use of French as one of the most helpful and attractive of studies.

The appeal fails to disturb the judgment except in respect to the matter admitted by all parties to have crept into the formal judgment by error, and must be dismissed with costs.

*Appeal dismissed.*

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[MEREDITH, C.J.C.P.]

July 15.

## TWIN CITY ICE CO. v. CITY OF OTTAWA.

*Water—Rideau River—Navigable or Unnavigable Stream—Riparian Rights—Access to Stream as Highway in Winter—Possession of Municipal Corporation—"Reclaimed" Land—Title by Possession—Limitations Act, R.S.O. 1914, ch. 75, sec. 35—Bed of Navigable Waters Act, 1 Geo. V. ch. 6 (O.)—Effect as to Riparian Rights—Restoration—Acquiescence—Damages—Right of Action—Accretion—Exercise of Rights—Opening of Highway—Municipal By-law—Acknowledgment—Compensation—Municipal Act, R.S.O. 1914, ch. 192, secs. 322 (3), 326—Right of Access from Private Land to Highway—"Right in the Nature of an Easement"—Costs.*

The plaintiffs and their predecessors in title owned land in the city of Ottawa, which was originally bounded by the Rideau river. Many years before action, the defendants (a municipal corporation) took possession of all the land that was, or had been, covered by water in front of the plaintiffs' land, and of other lands, as of right, using the whole tract as a dumping-ground, and rapidly filling it in, so that, in May, 1906, it had been "reclaimed" from the river, not only between the original river-boundary of the plaintiffs' land and a highway called Water street, but also across that highway, and beyond that again—all connection between the plaintiffs' land and the river being, practically, unalterably severed. This state of affairs had existed for many more than ten years before this action was brought. The filling-in was not accomplished by isolated acts of trespass, but by continuous acts as of ownership, both in summer and winter:—

*Held*, assuming that the stream was not navigable, and that the plaintiffs' predecessors in title owned the land now covered by the dump, converted in part into a highway, that that title was lost to them and the plaintiffs, and gained by the defendants by length of possession—open and unqualified possession as of right.

(2) That, if possession gave title to the land itself, no claim could be made regarding riparian rights, because they were effectually cut off by the acts of the defendants in acquiring title; and such rights as the plaintiffs or their predecessors might have had were lost to them and gained by the defendants by length of possession and under the provisions of sec. 35 of the Limitations Act, R.S.O. 1914, ch. 75.

(3) At the trial of this action—which was brought to obtain a declaration of the plaintiffs' rights, for possession, and other relief—the plaintiffs endeavoured to prove that the stream, at the place in question, was not a navigable one, and confined their claims to riparian rights upon an unnavigable stream. The only proof of injury to the plaintiffs was in respect of access to the stream, as a highway, in winter, when frozen over firmly enough to carry horses and waggons:—

*Held*, that the action, thus limited, failed, because, the stream being regarded as unnavigable, it was not a highway, and there was no right of passage over it.

(4) That, assuming that the stream was navigable, before 1911 the bed was the property of the owner of the land on its bank; and the defendants had, prior to 1911, acquired by length of possession a title which cut off riparian rights. The Bed of Navigable Waters Act, 1911 (1 Geo. V. ch. 6 (O.)), gave the Crown the bed of the stream, but it did not restore the riparian rights to land which had legally, as well as in fact, ceased to extend to the river; and there was such deprivation of all such rights as, under sec. 35 of the Limitations Act, precluded all claims in this action. And, if that were not so, there was such acquiescence as prevented the plaintiffs from seeking a restoration of such rights.

(5) That any right of action for damages would be, not in the plaintiffs, but in their predecessors in title, upon whom the injury was inflicted.

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- (6) That the claim of the plaintiffs to the dump-made land as an accretion was without any foundation in fact or law.
- (7) That the fact that teams working in connection with the plaintiffs' land passed over the dumps and made use of the river as a highway, from time to time, was not proof of an exercise of riparian rights.
- (8) That a by-law of the defendants providing for the opening of Water street did not confer on the owners of the plaintiffs' land any right which otherwise they would not have; nor could it be regarded as an acknowledgment, binding on the defendants, of any right or title of the plaintiffs.
- (9) That, if the plaintiffs had any right to compensation under the by-law, they had not lost it by reason of the provisions of sec. 326 of the Municipal Act, R.S.O. 1914, ch. 192. The right of access from and to private land to and from a highway is commonly spoken of as an easement, and comes within the words "an easement or right in the nature of an easement" in sub-sec. 3 of sec. 326; and the by-law could not be considered to have covered any such right, no statement of the nature and extent of it being contained in the by-law, as required by sec. 322, sub-sec. 3, of the Municipal Act.
- (10) That, even if the plaintiffs were entitled to use the river in connection with their land, as a highway, when frozen over in winter, they would not suffer any substantial damages if obliged to go to the river by way of Water street and another street.
- (11) The action was dismissed without costs.

ACTION for a declaration that the plaintiffs were the owners of all the land between the shore-line of the Rideau river, as it stood in 1866, and the middle of the main channel, in front of their land in the city of Ottawa bordering on the river, and for possession, an injunction, and damages.

June 15. The action was tried by MEREDITH, C.J.C.P., without a jury, at Ottawa.

*R. A. Pringle*, K.C., and *L. Côté*, for the plaintiffs.

*F. B. Proctor*, for the defendants.

July 15. MEREDITH, C.J.C.P.:—If the pleadings were the only limit to the number of questions, important and difficult, involved in this action, more questions would now need consideration than are involved in actions of this character generally.

But that is not so.

The course which the plaintiffs adopted at the trial has put a much narrower limit to the number of such questions which must be considered; though it may be advisable to express an opinion upon all of them, a course which the parties desire.

Under the pleadings, the plaintiffs would be at liberty to enforce any riparian rights they might have, whether the river in question is, or is not, a navigable stream: but at the trial they took the position, and endeavoured to prove, that the stream is

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not a navigable one, and confined their claims to riparian rights upon a stream not navigable.

Only one witness was called upon this branch of the case; and he was called and examined as a witness for the plaintiffs. If his view of the question were to be accepted, the plaintiffs have succeeded in proof of their contention that the stream, at the place in question, is not a navigable one.

And, as the only proof of injury to the plaintiffs, and the only claim made by them at the trial, was in respect of access to the stream, as a highway, in winter, when frozen over firmly enough to carry horses and waggons, the action fails, because, not being a navigable stream, there is no such right of passage over it. It is not a highway. And, if that be so, the case is ended.

But, if a claim and proof in respect of other riparian rights had been made, they could not, in my judgment, succeed in this action, whether the stream is or is not navigable.

Assuming that it is not navigable, and that the plaintiffs' predecessors in title owned the land to the centre of the stream—a thing which, having regard to plans, etc., I more than doubt—then they lost title to it by the defendants' length of possession of it.

Many years ago, the defendants took possession of all the land that was, or had been, covered by water in front of the land in question, and of other lands, as of right, using it as a dumping-ground, and rapidly filling it in in that way, so that, in May, 1906, it had been filled in and "reclaimed" from the river, not only between the original river boundary of the land now owned by the plaintiffs, and the highway now called Water street, an area of probably more than an acre, but also across that highway—sixty-six feet—and beyond that again, more than three acres in extent, as is shewn in the plan marked exhibit 6 made for the purpose of obtaining a patent of that part of the bed of the river covered by the "dump." So that all connection between the land now owned by the plaintiffs and the river was, practically, unalterably severed. This state of affairs had existed for many more than ten years before this action was brought; and so, on the assumption that the plaintiffs' predecessors in title owned the land now covered by the dump, con-

verted in part into a highway, that title was lost to them, and the plaintiffs, and gained by the defendants by length of possession. The filling-in was not accomplished by isolated acts of trespass, but by continuous acts as of ownership, not only in the summer, but also in the winter, when great quantities of snow were dumped there. From the first it was a clear case of open and unqualified possession as of right, each waggon-load deposited there adding to its aggressiveness.

No objection was taken to this active continuous possession by the defendants or their predecessors in title: and that seems to be reasonably explicable in this way: the land in question, according to the plan under which it was sold, never extended as far as the highway called Water street; and it may well be that the river afforded no substantial advantage to the land; and that owners, whether they thought they had or had not a right to object to the making of land between their land and the river, may have thought that the filling-in, and the building of the highway, would be more in their interests than it would be to preserve the original conditions existing there; and it is more than likely that, truly, it was.

If possession give title to the land itself, no claim can be made regarding riparian rights, because they are effectually cut off by the acts of the defendants in acquiring title: just as if the bed of the stream had been sold to them by the plaintiffs with a right to do as they have done. And I find also that such rights as are, or might be, involved in this case, have been lost to the owners of the land now owned by the plaintiffs and gained by the defendants by length of possession and under the provisions of sec. 35 of the Limitations Act, R.S.O. 1914, ch. 75.\*

\*35. No claim which may lawfully be made at the common law by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed, or derived upon, over, or from any land or water of the Crown or being the property of any person, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to the period of twenty years, but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

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And, assuming that the stream is 'a navigable one:—

Prior to the year 1911, the bed of the stream was the property of the owner of the land on its bank; and, prior to that year, the defendants had acquired title, as before mentioned, by length of possession, a title which, as I have already said, cut off riparian rights. The Act of 1911—the Bed of Navigable Waters Act, 1 Geo. V. ch. 6 (O.)—gave the Crown the bed of the stream, but it did not restore the riparian rights to land which had legally, as well as in fact, ceased to extend to the river. And, as I have said, I find that there was such deprivation of all such rights as, under sec. 35 of the Limitations Act, precludes all claims in this action.

And, if that were not so, there was such long acquiescence in the acts of the defendants, so unalterably severing the plaintiffs' land from the river, as to prevent them from seeking a restoration of such rights.

How could such rights in any reasonable manner be restored? Such relief as removal of the dump is out of the question, even if that would bring the land in question to the water's edge, which is very improbable: and, if damages were sought, not possession of the land or restoration of riparian rights, the right of action would be in the plaintiffs' predecessors in title, upon whom the injury was inflicted.

The claim of the plaintiffs to the acres of dump-made land, as an accretion, is obviously without any foundation in fact or law. It might, of course, be, that land so made over water would become the land of the owner of the land under water, though made by a stranger to the title to the land under the water; but, for the reasons already given, the owners of the land now owned by the plaintiffs have lost any such right as that.

The fact that teams working in connection with the plaintiffs' land passed over the dumps and made use of the river as a highway, from time to time, does not, in my opinion, materially affect the case. That was not an exercise of riparian rights, but was no more than any one, in no way connected with the plaintiffs' land, might have done. The riparian rights of the owners of the plaintiffs' land did not extend beyond that land.

Indeed, instead of being evidence of an exercise of riparian rights, it is rather evidence of an abandonment of them, of acquiescence in such rights being cut off so effectually by the dump-made land.

It was not contended, and I cannot see how it well could be, that the by-law providing for the opening of Water street conferred on the owners of the plaintiffs' land any right which otherwise they would not have; or how it can be treated as an acknowledgment, binding upon the defendants, of any right or title of the plaintiffs.

Nor can I give effect to the defendants' contention that, if the plaintiffs had any right to compensation under the by-law, they have lost it by reason of the provisions of sec. 326 of the Municipal Act, R.S.O. 1914, ch. 192.\*

The case would be, in my opinion, one for compensation for "injuriously affecting" land, and not for taking it, if the plaintiffs were entitled to any compensation, and so the right to compensation, the claim not having been made within a year, would be lost, under the section of the Act just mentioned, unless the claim is one in respect of an easement or other right in the nature of an easement.

It may be difficult to understand how a right to step on, or to step off, one's own land could properly be considered an easement or anything in the nature of an easement; or to understand how the right to step into a highway could either, that is, could be considered a private right, connected with land, over other land. I presume that even a trespasser upon private land would be entitled to step off it into his rights, as one of the public, upon a highway; that he would not, because a trespasser on private property, continue to be a trespasser in the highway. He has a right to go there in any way he pleases so long as he

\*326.—(1) Except where the person entitled to compensation is an infant, a lunatic, or of unsound mind, a claim for compensation for damages resulting from his land being injuriously affected shall be made in writing, with particulars of the claim, within one year after the injury was sustained, or after it became known to such person, and, if not so made, the right to compensation shall be forever barred.

(3) This section shall not apply where the expropriating by-law provides for acquiring an easement or right in the nature of an easement, and the damages arise from the exercise of such easement or right.

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does not unduly impede other traffic or injure the way. But the right of access from private land to and from a highway is commonly spoken of as an easement, and I am sure may be held, and was intended, to be within the meaning of the words "an easement or other right in the nature of an easement." And, if that be so, the by-law cannot be considered to have covered any such right, no statement of the nature and extent of it being contained in the by-law, as required by sec. 322, sub-sec. (3), of the Municipal Act.†

Although the plaintiffs' action fails, on the short ground that the only proof of injury is in respect of a highway, which at the trial they contended is not a highway, and gave proof accordingly, I have dealt with all the points discussed at the trial, and others, so that the parties may have my views of them, whether the case is, or is not, carried further.

Under all the circumstances of the case, I do not see fit to make any order as to costs of the action.

And upon the question of damages I cannot find that, even if the plaintiffs were entitled to use the river in connection with their land, as a highway, when frozen over in winter, they would suffer any substantial damages if obliged to go to the river by way of Water and St. Joseph's streets, the defendants being willing to make the means of passing from St. Joseph's street to the river as easy as from the dump, or even as from the land now owned by the plaintiffs in the days before the dump.

*Action dismissed without costs.*

†(3) A by-law for entering on or expropriating land shall contain a description of the land, and, if it is proposed to expropriate an easement or other right in the nature of an easement, a statement of the nature and extent of the easement to be expropriated.

[IN CHAMBERS.]

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Aug. 28.

RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT  
FRANCES.

*Appeal—Privy Council—Right of Appeal—Amount in Controversy—Assessment and Taxes—Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 2—Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48 (6).*

The company proposed to appeal to His Majesty in His Privy Council from the decision of a Divisional Court of the Appellate Division of the Supreme Court of Ontario upon an appeal from a decision of the Ontario Railway and Municipal Board in regard to the assessment of the company's lands and business in the town for the year 1914. The decision of the Divisional Court was that the actual value of the lands assessed should be fixed at \$100,000 and their business assessment at \$210,000. The grounds of the proposed appeal were that the value of the lands should be fixed at \$5,000 instead of \$100,000, and that the business assessment should be on the basis of 25 per cent. instead of 60 per cent. of the total assessment of lands and buildings. It was shewn, however, that the total taxes against the company for 1914 amounted to only \$3,300 on the basis of the Divisional Court's decision, and that of this \$3,300 the only amount actually in dispute was \$1,206.25, being the school rate at .05 per cent. on the sum which the company sought to have struck off their assessment:—

*Held*, that the matter in controversy, for the purposes of an appeal from the decision of the Divisional Court, was not shewn to exceed \$4,000 (Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 2, and Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48 (6)); and, therefore, the proposed appeal did not lie as of right; and a motion for approval of the security lodged for the purpose of an appeal was refused. *Quære*, whether any questions but questions of fact were involved, and whether an appeal on a question of assessment was intended to be allowed.

MOTION by the company for approval of the security lodged by them upon a proposed appeal to His Majesty in His Privy Council from the decision of a Divisional Court of the Appellate Division, 8 O.W.N. 216, whereby it was declared that, in the opinion of the Court, the actual value of the lands of the company assessed should be fixed at \$100,000 and that the amount of the business assessment of the company should be fixed at \$210,000.

The motion was heard by MAGEE, J.A., a Judge of the Appellate Division, in Chambers.

*Glyn Osler*, for the company.

*Grayson Smith*, for the town corporation.



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August 28. MAGEE, J.A.:—The company desire to appeal to His Majesty in his Privy Council from the decision of a Divisional Court, reported 8 O.W.N. 216, whereby the Court declared that it was of opinion that the actual value of the lands assessed should be fixed at \$100,000 and that the amount of business assessment of the appellants should be fixed at \$210,000. The Railway and Municipal Board's valuation of the buildings at \$250,000 was not disputed. The company now ask for approval of the security on appeal and thereby incidentally of the appeal. It is claimed that "the matter in controversy" exceeds \$4,000, and therefore our statutes (Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 2, and Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48\*) permit the appeal as of right. The town corporation oppose this contention and shew by affidavit of the town treasurer that in fact the total taxes against the company for 1914 amount only to \$3,300 on the basis of the Divisional Court's decision—as the company have under a by-law a fixed assessment of \$25,000, as to all but school rates and local improvement rates. Of this \$3,300, the only amount actually in dispute is \$1,206.25, being the school rate of .05 per cent. on \$241,250, which the company seek to have struck off their assessment. The grounds for the proposed appeal are "that the value of the lands should be fixed at \$5,000 instead of \$100,000," and "that the business assessment should be fixed on the basis of 25 per cent. instead of 60 per cent. of the total assessment of lands and buildings." It is alleged that the valuation of the land at \$100,000 has been

\*Section 2 of R.S.O. 1914, ch. 54: "Where the matter in controversy in any case exceeds the sum or value of \$4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council; and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council."

Sub-section 6 of sec. 48 of R.S.O. 1914, ch. 186: "When the matter in controversy exceeds the sum or value of \$4,000 or relates to the duration of a privilege to operate a railway along a highway, or to the construction of an agreement between a railway company and a municipal corporation, or to any demand affecting the rights of the public or to any demand of a general or public nature affecting future rights, an appeal shall lie from the Divisional Court of the Appellate Division of the Supreme Court to His Majesty in His Privy Council, but no appeal shall lie to His Majesty in His Privy Council in any other case."

arrived at by including the value of franchises which are really no part of the land and do not increase its value as land. There is, however, no indication in the reasons of the Divisional Court as to how the valuation of \$100,000 was arrived at, it being merely intended as a restoration of the amount fixed by the District Court Judge. There is no indication that there is anything but a question of fact involved therein. As to whether the business tax, under the Assessment Act, R.S.O. 1914, ch. 195, sec. 10, should be on the basis of 60 per cent. or 25 per cent. of the value of land and buildings, that was considered by the Divisional Court to have been dealt with by the Board as a question of fact. On questions of fact no appeal lies from decisions of the Board.

Whether or not any questions but questions of fact are involved, however, and whether or not an appeal on questions of assessment was intended to be allowed, I am of opinion that the matter in controversy, for the purposes of an appeal from the decision of the Divisional Court, is not shewn to exceed \$4,000. All that is in question really is the taxes for the one year, 1914, which can be levied upon the assessed value. Those taxes have, during the course of the various appeals of the company, been fixed, and are not now left to estimation, and their amount, even if the company's full contentions were allowed, would be reduced by only \$1,206.25. It is true that, especially in the case of individuals, other rights, such as voting, may depend on the amount of an assessment, but no such rights are put forward or attempted to be valued or shewn to be in controversy here.

The cases of *City of Toronto v. Toronto Electric Light Co.* (1906), 11 O.L.R. 310, and *Canadian Pacific R.W. Co. v. City of Toronto* (1909), 19 O.L.R. 663, and *Beardmore v. City of Toronto* (1910), 2 O.W.N. 479, were referred to by counsel on both sides, but the principles upon which they were decided are rather against the appellants, as is also the decision in *Fréchette v. Simoneau* (1900), 31 S.C.R. 12, cited for the respondents.

The application is therefore refused.

MAGEE, J.A.  
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RE  
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AND  
MINNESOTA  
POWER CO.  
AND  
TOWN OF  
FORT  
FRANCES.

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Sept. 9.

[IN CHAMBERS.]

REX v. WEST.

*Criminal Law—Obstructing Peace Officer—Criminal Code, sec. 169—Summary Conviction by Police Magistrate—Indictable Offence—Option of Crown—Procedure—Mode of Trial—Consent of Accused—Secs. 773 (e) and 778 of Code.*

Section 169 of the Criminal Code, R.S.C. 1906, ch. 146, creates the offence of wilfully obstructing a peace officer in the execution of his duty, and gives the Crown the right to proceed against one accused of that offence, either under the summary convictions sections of the Code (Part XV.), or by indictment. If the procedure is by indictment, the accused has the right of election afforded by sec. 778, and upon conviction more serious punishment may follow. The right to choose the mode of prosecution is in the Crown; the sole right of the accused is to select the tribunal to try him where the Crown elects to prosecute for an indictable offence. And where the Crown elects to adopt the summary convictions procedure, the right of a Police Magistrate to try the accused does not depend upon the latter's consent; the summary trials procedure (Part XVI. of the Code, secs. 771 to 799) is inapplicable. Section 773 (e) mentions this particular offence as one of the indictable offences for which a person may be tried summarily; but it relates to cases where the procedure by indictment is adopted.

*Regina v. Crossen* (1899), 3 Can. Crim. Cas. 152, and *Rez v. Carmichael* (1902), 7 Can. Crim. Cas. 167, not followed.

*Rez v. Nelson* (1901), 4 Can. Crim. Cas. 461, approved.

And it was held, upon *habeas corpus*, that the accused in this case was properly tried and summarily convicted by a Police Magistrate.

MOTION, upon the return of a *habeas corpus* and *certiorari* in aid, for an order for the discharge of the defendant from custody under a warrant of commitment issued pursuant to a conviction of the defendant by the Police Magistrate for the Town of Wiarton for wilfully obstructing a peace officer in the execution of his duty.

August 26. The motion was heard by MIDDLETON, J., in Chambers.

G. H. Külmer, K.C., for the defendant.

Edward Bayly, K.C., for the Crown.

September 9. MIDDLETON, J.:—Only one point of substance was not finally disposed of upon the argument. It appears that one Glover, a police constable, was, while endeavouring to arrest an intoxicated woman upon the highway in Wiarton, interfered with and obstructed by the accused and another. Under sec. 169 of the Criminal Code, R.S.C. 1906, ch. 146, every one who wil-

fully obstructs any peace officer in the execution of his duty is guilty of an offence punishable on indictment or on summary conviction, and is liable, if convicted, on indictment, to two years' imprisonment, and, on summary conviction, to six months' imprisonment or a fine. The accused was not indicted, but proceedings were taken against him looking to his summary conviction for this offence. It is argued that the magistrate had no jurisdiction to try and summarily to convict, because he did not follow the procedure proper in cases of summary trial of persons for indictable offences, but utterly inappropriate and unmeaning in the case of summary convictions, for he did not follow the course pointed out in sec. 778 by putting the accused to his election—which is only necessary where the case is one that cannot be tried summarily without the consent of the accused.

Section 169 creates the offence, and gives to the Crown the right either to try summarily, when a less severe punishment may be inflicted, or, if the Crown thinks the offence is serious enough to warrant an indictment, then, at the Crown's election, the accused may be prosecuted as for an indictable offence, with the result that he has the right of election afforded by sec. 778, and with the consequence that upon conviction more serious punishment may follow. The right to choose the mode of prosecution is a right given to the Crown, and not the right of the accused. His sole right is to select the tribunal to try him if the Crown elects to prosecute for an indictable offence.

The only colour that is lent to the argument for the accused is the mention in sec. 773 (e) of this particular crime in the catalogue of indictable offences for which persons may be tried summarily. This, I think, does not help the argument, for the whole of Part XVI. of the Code, secs. 771 to 799, relates solely to the trial of indictable offences, and sec. 773 (e) must relate to cases where the charge against an accused is laid as an indictable offence.

Common assault may either be prosecuted in a summary way or upon an indictment. The accused has no choice; the choice rests entirely with the prosecution; and it would be a *reductio ad absurdum* to suppose that in every case of common assault the

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magistrate should be called upon to give to the accused the right to be tried as for an indictable offence.

Counsel for the prisoner very properly relied upon two cases, *Regina v. Crossen* (1899), 3 Can. Crim. Cas. 152, and *Rex v. Carmichael* (1902), 7 Can. Crim. Cas. 167. In neither of these cases does the true situation appear to have been appreciated. In the Manitoba case, the report is of an oral judgment, and the distinction between a summary trial under Part. XVI. and a summary conviction under Part XV. appears to have been entirely ignored. In the Nova Scotia case, the Judge followed the earlier Manitoba decision without question.

In *Rex v. Nelson* (1901), 4 Can. Crim. Cas. 461, it is true, the decision is by a British Columbia Judge, a Province where there is wider power of summary trial than in Ontario; but the comments of Mr. Justice Drake on the Manitoba case shew that he had appreciated how unsatisfactory it is; and I agree with him that it ignores the language of the section now numbered 169, and that under the Code "the accused can be tried summarily by the magistrate under the summary conviction clauses of the Code, or he can be tried before a magistrate as for an indictable offence."

This man was rightly tried summarily, and there is some evidence which, if believed, justified his conviction. He is therefore remanded to custody.

[This decision was affirmed by a Divisional Court of the Appellate Division on the 27th September, 1915. The reasons of the Divisional Court will be reported in regular course.]

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Sept. 9.

[IN CHAMBERS.]

RE REX v. WHITE.

*Criminal Law—Police Magistrate—Adjournment—Jurisdiction—Evidence—Trial de Novo—Remand "till Called on" without Adjudication of Guilt—Prohibition—Criminal Code, secs. 722, 1081.*

A magistrate has no power to adjourn the trial of an accused merely because the evidence for the Crown is unsatisfactory and inconclusive; in such a case the accused is entitled to the benefit of the doubt and to an acquittal.

The accused was brought before a magistrate upon a charge of keeping a common betting-house; the evidence for the Crown was heard, the accused was called upon for her defence, and gave her evidence. The accused was then "remanded for trial till called on;" the next day she was sum-

moned to appear before the magistrate, and upon the return of that summons the Crown proposed to give new evidence, not before known to the Crown, and not evidence in reply:—

*Held*, that the magistrate had no jurisdiction to proceed in this way: if the evidence first given was insufficient to establish the Crown's case, the accused should be acquitted; and an order of prohibition was granted. The adjournment was not such as is contemplated by sec. 722 of the Criminal Code; and the power to suspend sentence given by sec. 1081 cannot be exercised until there has been an adjudication of guilt.

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MOTION by Elizabeth White, the defendant, for an order prohibiting the Police Magistrate for the City of Toronto from taking any further proceedings against her upon a charge of keeping a common betting-house.

July 15. The motion was heard by MIDDLETON, J., in Chambers.

*T. H. Lennox*, K.C., for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

September 9. MIDDLETON, J.:—The accused was, with two others, charged on the 17th June, 1915, with keeping a certain common betting-house in Toronto. On the 24th June, evidence was taken before the Police Magistrate. The other two were convicted and sentenced. This accused was "remanded for trial till called on." On the 25th June, a summons was served, calling upon the accused to appear before the magistrate to "receive judgment upon" the charge. Thereupon this motion was launched.

On the evidence taken before the magistrate up to the time of the adjournment, he could not have convicted the accused; but, after the adjournment, further evidence, it is said, was discovered, which it was intended to give on the part of the Crown, and upon this new evidence it was intended to ask conviction. The hearing which took place on the 24th was intended to be a full and complete trial of the charge. The evidence for the Crown was heard, the accused was called upon for her defence, and gave her evidence. The evidence which it is now sought to give was not then tendered, nor was it known to the Crown, and, if admitted against the accused, was evidence in chief and not in reply. What is really intended is in this way to commence *de novo* and try the prisoner again upon this further evidence—a jurisdiction that I am satisfied the magistrate does not possess.

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It is said that in the Police Court the practice has grown up of adjourning cases until called upon, when the magistrate is unable to convict upon the evidence, and when he is yet not satisfied of the innocence of the accused. It need hardly be pointed out that this practice, if it exists, is erroneous. If the guilt of the accused has been established by the Crown to the satisfaction of the magistrate, it is then his duty to convict. If the guilt has not been established to his satisfaction, it is his plain duty to acquit. He is not entitled to adopt any third course and introduce into our practice something analogous to the Scotch verdict of "not proven," and by no device can the magistrate leave the matter in this unsatisfactory position, where the trial may be begun again or may be resumed upon the discovery of fresh evidence.

If a proper case is made for an adjournment of the trial, then, under sec. 722 of the Criminal Code, R.S.C. 1906, ch. 146, it is the duty of the magistrate to "adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party . . . but no such adjournment shall be for more than eight days." The adjournment in question here is clearly not such an adjournment as contemplated by this section.

If the magistrate is prepared to find guilt, but, under the circumstances of the case, does not think it proper that punishment should be imposed, power is given to him (sec. 1081 of the Code) to suspend sentence in certain cases; but sentence cannot be suspended until there has been an adjudication of guilt. There is nowhere power given, as already pointed out, to adjourn the trial merely because the evidence for the Crown is unsatisfactory and inconclusive; for in that case the prisoner is entitled to the benefit of the doubt and to an acquittal.

The prohibition will, therefore, be granted.

[IN CHAMBERS.]

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REX V. SCAYNETTI.

Sept. 11

*Liquor License Act—Keeping Intoxicating Liquor for Sale—Magistrate's Conviction—Motion to Quash—Evidence — Inference — "Liquor" — "Beer"—R.S.O. 1914, ch. 215, sec. 2 (i)—Judicial Knowledge.*

Upon a motion to quash a magistrate's conviction of the defendant for keeping intoxicating liquor for sale, contrary to the Liquor License Act, R.S.O. 1914, ch. 215, it appeared that there was evidence from which the magistrate could infer that liquor was kept for sale upon the defendant's premises; and it was *held*, that the finding of the magistrate could not be reviewed.

*Held*, also that under sec. 2 (i) of the Act it is not necessary to shew that the liquor sold or kept for sale was intoxicating if it is shewn that it was a spirituous or malt liquor—and beer, which was the liquor found to have been kept for sale in this case, is both a spirituous and a malt liquor, as shewn by dictionary definitions.

There is such a thing as judicial knowledge; and a Judge may inform himself from dictionaries.

*Attorney-General v. Cast-Plate Glass Co.* (1792), 1 Anst. 39, 44, applied.

MOTION by the defendant to quash a magistrate's conviction for keeping intoxicating liquor for sale, contrary to the Liquor License Act, R.S.O. 1914, ch. 215.

August 26. The motion was heard by MIDDLETON, J., in Chambers.

*M. J. O'Reilly*, K.C., for the defendant.

*Edward Bayly*, K.C., for the Crown.

September 11. MIDDLETON, J.:—Motion to quash a conviction under the Liquor License Act, upon the ground that the evidence does not disclose an offence: firstly, because it was not shewn that the beer found on the defendant's premises was intoxicating liquor; and, secondly, because the magistrate could not, upon the evidence, infer that the liquor was kept for sale.

There is, in my view, evidence upon which the magistrate could infer that the liquor was kept for sale. I do not know that, upon the evidence, I should have arrived at the conclusion to which the magistrate has come; but this is not the question. There was evidence upon which it was open to him so to find.

Upon the other point, the evidence discloses that beer was sold and being consumed. There was also a half bottle of whisky



Middleton, J. in the cupboard. I gather that the conviction was in respect of  
1916 the beer, and not in respect of the whisky, which was not shewn  
to have been sold.  
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There was no contention before the magistrate that the beer was not in fact intoxicating. On cross-examination it was shewn that the beer was a brand of lager labelled "Regal." The contention put forward on the part of the defendant was that he purchased the liquor as the agent of his boarders and for them, and that this did not in fact constitute an offence against the Act. Apparently the magistrate has discredited this story.

By the Liquor License Act, sec. 2(i), "liquor" is defined as including all spirituous and malt liquors, as well as all drinkable liquids which are intoxicating. It is then enacted that any liquor which contains more than two and a half per cent. of proof spirits shall be conclusively deemed to be intoxicating. It is not necessary to prove that the liquor which was sold was intoxicating if it is shewn that it was a spirituous or malt liquor.

The three things which, by the interpretation clause, are included under the head of "liquor," are spirituous liquor, malt liquor, and any other combination or drinkable liquid which is intoxicating.

The Concise Oxford Dictionary defines beer as "alcoholic liquor from fermented malt, flavoured with hops;" the Century Dictionary as "an alcoholic liquor made from any farinaceous grain, generally from barley, which is first malted and ground, and its fermentable substance extracted by hot water."

Thus, beer is clearly both a spirituous and a malt liquor.

I have no sympathy with that view of the functions of the Court which assumes that there is no such thing as judicial knowledge. It was at one time suggested that evidence was necessary to establish that the beating of a drum made a noise. Rather, the true principle is indicated by what was said by Eyre, C.B., in *Attorney-General v. Cast-Plate Glass Co.* (1792), 1 Anst. 39, 44: "In explaining an Act of Parliament, it is impossible to contend that evidence should be admitted; for that would make it a question of fact, in place of a question of law. The Judge is to direct the jury as to the point of law, and in doing so, must form his judgment of the meaning of the Legislature in the same manner

as if it had come before him by demurrer, where no evidence could be admitted. Yet on demurrer, a Judge may well inform himself from dictionaries or books on the particular subject concerning the meaning of any word. If he does so at *nisi prius*, and shews them to the jury, they are not to be considered as evidence, but only as the grounds on which the Judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.”

The application fails, and must be dismissed. In view of all the circumstances, the dismissal will be without costs.

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## [IN CHAMBERS.]

## RE ISLER.

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Sept. 14.

*Evidence—Order for Examination of Person in Ontario—Testimony for Use in French Court—Letters Rogatory—Criminal Proceedings against Examinee—Right to Examine Accused—French Law—Canada Evidence Act, R.S.C. 1906, ch. 145, secs. 41, 45.*

Letters rogatory were issued from a French Court seeking the aid of the Supreme Court of Ontario in obtaining the testimony of a person within the jurisdiction of the Ontario Court in relation to criminal proceedings pending against him in the French Court:—

*Held*, that an order should be made, under sec. 41 of the Canada Evidence Act, R.S.C. 1906, ch. 145, for the examination upon oath in Ontario of the person referred to, and commanding his attendance for examination, leaving it to him to object (if he should see fit) to undergo any examination or to answer any questions, upon the ground that to answer might incriminate him: sec. 45 of the Act.

*Semble*, that the law of France authorises the examination of the accused, and so differs from English and Canadian law.

*Devilla v. Fells and Co.* (1879), 40 L.T.R. 423, and *Eccles & Co. v. Louisville and Nashville R.R. Co.*, [1912] 1 K.B. 135, referred to.

APPLICATION on behalf of the Attorney-General for Ontario for an order under Part II. of the Canada Evidence Act, R.S.C. 1906, ch. 145, authorising the examination and commanding the attendance for examination of Carl Frederick Isler, a person within the jurisdiction of the Supreme Court of Ontario, whose testimony was required for use in criminal proceedings against him in a French Court.\*

\*Section 41 of the Act provides: “Whenever, upon an application for that purpose, it is made to appear to any court or judge, that any court or tribunal of competent jurisdiction, in any other of His Majesty’s dom-

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August 26. The application was heard by MIDDLETON, J., in Chambers.

*Edward Bayly*, K.C., for the Attorney-General.

September 14. MIDDLETON, J.:—The application is based upon letters rogatory from the Judge of Instruction of the Court of First Instance of the Department of the Seine, in the Republic of France, seeking the aid of this Court in obtaining the testimony of Isler, now in Ontario, in relation to certain criminal proceedings pending in that Court against Isler upon a charge of fraud.

As, according to the law of Canada, the accused cannot be compelled to give evidence, though he is competent to testify on his own behalf if he so desires, I reserved judgment for the purpose of carefully considering the situation. Apparently the law of France authorises the examination of the accused, and so differs from English and Canadian law.

I have found two cases throwing light upon the matter: *Desilla v. Fells and Co.* (1879), 40 L.T.R. 423, and *Eccles & Co. v. Louisville and Nashville R.R. Co.*, [1912] 1 K.B. 135, interpreting the corresponding English enactment.

In the earlier of these cases it was said by Cockburn, C.J.: "I agree with the defendants' counsel that under this Act evidence can only be taken by the English mode; but I am not prepared to say that it must be limited to that which is admissible in English Courts. We ought to afford foreign Courts the fullest benefit we can, and if we know their rules of evidence we should give them effect in examinations of this kind."

This statement is quoted with approval in the later authority.

inions, or in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to such matter, of any party or witness within the jurisdiction of such first mentioned court . . . such court or judge may, in its or his discretion, order the examination upon oath upon interrogatories, or otherwise, before any person or persons named in such order, of such party or witness accordingly, and by the same or any subsequent order may command the attendance of such party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in such order, and of any other writings or documents relating to the matter in question that are in the possession or power of such party or witness."

Under our statute the only limitation upon the right to examine is that found in sec. 45,\* which gives the witness the same right to refuse to answer questions tending to criminate, or other questions, as a party or witness would have in a cause pending in the Court by which, or by a Judge whereof, the order is made.

Considering the matter as carefully as I can, I have come to the conclusion that the question of the obligation of Isler to submit to examination does not now arise, and that I ought to make the order sought, leaving it to Isler to object (if he sees fit) to undergo any examination or to answer any questions which he may think would criminate him. For all I know, he may be ready and anxious to give evidence; and, following the provisions of the statute, in the spirit indicated by the two cases adhered to, I think my proper course is to make the order, reserving to him all his rights under the section referred to.

\*Section 45 provides: "Any person examined under any order made under this Part shall have the like right to refuse to answer questions tending to criminate himself, or other questions, as a party or witness, as the case may be, would have in any cause pending in the court by which, or by a judge whereof, such order is made. 2. No person shall be compelled to produce, under any such order, any writing or other document that he could not be compelled to produce at a trial of such a cause."

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[IN CHAMBERS.]

HIBBARD V. TOWNSHIP OF YORK.

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Sept. 17.

*Costs—Discretion of Trial Judge—Leave to Appeal—Judicature Act. R.S.O. 1914, ch. 56, sec. 24—Scale of Costs—Jurisdiction of County Courts—Action Removed into Supreme Court—County Courts Act. R.S.O. 1914, ch. 59, sec. 22(7).*

Where an action is by order transferred from a County Court to the Supreme Court of Ontario, the Judge before whom the action is tried has the usual discretion as to costs: sub-sec. (7) of sec. 22 of the County Courts Act, R.S.O. 1914, ch. 59, does not give any *prima facie* right to costs upon the Supreme Court scale—it applies to a case where the Judge has made an order for costs generally, without limitation as to scale.

The ordinary jurisdiction of the County Courts in actions for damages for torts is limited to claims not exceeding \$500: any jurisdiction beyond that sum is a jurisdiction by consent substantially—evidenced on the part of the plaintiff by the claim made, and of the defendant in not objecting to the trial of such a claim in a County Court.

Where the plaintiff claimed \$2,500 damages in an action for a tort, brought in a County Court, and the action was removed into the Supreme Court,

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upon the application of the defendants, and tried by a Judge, who gave judgment for the plaintiff for \$300, with costs fixed at \$75. the Judge refused leave to the plaintiff to appeal as to the costs to a Divisional Court of the Appellate Division (sec. 24 of the Judicature Act, R.S.O. 1914, ch. 56).

The discretion to be exercised in granting leave to appeal from an order as to costs is that of the Judge who has made the order, and he should not act upon the discretion of any other Judge or of any Court.

MOTION by the plaintiff for leave to appeal to a Divisional Court of the Appellate Division from the judgment of MEREDITH, C.J.C.P., at the trial, upon the question of costs.

The action was brought in the County Court of the County of York to recover \$2,500 damages, under the Fatal Accidents Act, for the death of a person by reason of nonrepair of a highway. Upon the defendants' application, the action was removed into the Supreme Court of Ontario. It was tried by MEREDITH, C.J. C.P., without a jury, and judgment was given for the plaintiff for \$300, with costs fixed at \$75.

The plaintiff appealed, seeking to increase both damages and costs. On the 17th June, 1915, his appeal was heard by a Divisional Court, and dismissed as to damages; as to costs, the appeal was not disposed of, an opportunity being thus given to the plaintiff to apply for leave to appeal.\*

September 15. The motion for leave to appeal was heard by MEREDITH, C.J.C.P., in Chambers.

*H. E. Grosch*, for the plaintiff.

*Grant Cooper*, for the defendants.

September 17. MEREDITH, C.J.C.P.:—There is no good reason, nor any reason good or bad, that I can perceive, for giving leave to appeal, on the question of costs only, in this case; jus-

\*By sec. 24 of the Judicature Act, R.S.O. 1914, ch. 56, it is enacted: "No order of the High Court Division or of a Judge thereof made with the consent of parties shall be subject to appeal, and no order of the High Court Division or of a Judge thereof as to costs only which by law are left to the discretion of the Court shall be subject to appeal on the ground that the discretion was wrongly exercised, or that it was exercised under a misapprehension as to the facts or the law or on any other ground, except by leave of the Court or Judge making the order."

By sec. 74(1) of the same Act: "Subject to the express provisions of any statute, the costs of and incidental to all proceedings shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid."

tice seems to me to have been done to both parties in the order, respecting costs, made at the trial.

Encouragement should not be given to the launching in a higher Court of a claim that ought to be made in a lower Court; nor to the making of extravagant claims in a lower Court, especially if such claims are made in the hope of an objection to the jurisdiction being made which may end in the case being brought into a higher Court, and, lacking vigilance to prevent it, of advantage unduly had under sub-sec. (7) of sec. 22 of the County Courts Act, R.S.O. 1914, ch. 59, which does not give any *primâ facie* rights to costs upon the Supreme Court of Ontario scale, but does in substance interpret the meaning of a general order for costs, unlimited, as to scale, by the Judge who made it.\*

In cases of real doubt, and in cases near the border-line, interposition may well be abstained from. The whole subject is in the discretion of the trial Judge, whose unlimited order for costs is to be interpreted as an order for costs on the higher scale, but who is in no sense prevented from exercising a general discretion respecting them.

In this case the claim made was an extravagant one. There was no good reason for claiming any sum beyond that which would be within the jurisdiction of the County Court, and the plaintiff's conduct at the trial, in regard to the amount of damages sought, was, in my judgment, more than unreasonable.

The ordinary jurisdiction of the County Courts in actions such as this is limited to claims not exceeding \$500; any jurisdiction beyond that sum is a jurisdiction by consent substantially—evidenced on the part of the plaintiff by the claim made, and of the defendant in not objecting to the trial of such a claim, in that Court. So that a defendant may be put in the awkward position of being precluded from objecting to the jurisdiction, or of objecting and causing a removal of the action into the higher Court at the risk of having to pay costs on the higher Court

\*Sub-section (7) is as follows: "Where an action is transferred to the Supreme Court under the provisions of this section, if the plaintiff is awarded costs, unless otherwise ordered by the Court or a Judge, they shall be taxed according to the scale of the Supreme Court, whether or not the action be in fact within the proper competence of the County or District Court.

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scale, no matter how exorbitant the claim may have been, or though purposely exorbitant with a view to higher Court costs, if the trial Judge should unwittingly give to the plaintiff the costs of the action not expressly limited as to scale or otherwise.

Ordinarily the discretion should be exercised as stated at the trial: costs upon the scale of the Court in which the action should have been tried, with a set-off of costs when tried in a higher Court by reason of a claim being made for more than one within the ordinary jurisdiction of the Court in which the action should have been tried; and such an exercise of that discretion applies with much force to the circumstances of this case. The plaintiff already has costs awarded to him amounting to 25 per cent. of the whole amount of damages awarded to him. Is not that enough? To give leave to appeal for more, with the addition of possibly 50 per cent. more for the costs of the appeal on that question, as well as another 50 per cent. for the costs of the appeal on the merits already had—ending in the costs. including those between solicitor and client, probably more than doubling the damages—would be, in my judgment, inexcusable.

But it is said that one of the Appellate Divisions retained the appeal on the merits in order that this application might be made, and from that it is argued that that Division must have been of opinion that such leave should be granted; but, whether or not that is a logical deduction from the action of that Division, I cannot give effect to the contention. If such were not the intention, the contention is baseless; otherwise, it is my discretion, not that of any other Judge or Court, that the Legislature has said shall be exercised; and, that being so, it would be a failure of duty, and a disregard of the legislation, if I were to act upon the discretion of any other Judge or any Court.

It would be an injustice to the learned counsel for the parties at the trial to say that any point, upon any question, was overlooked—except a reference to the case of *Robinson v. Village of Havelock* (1914), 7 O.W.N. 60, not then reported in the Ontario Law Reports.\*

\*See now 32 O.L.R. 25.

The application is refused. There will be no order as to costs of it; I cannot make any one but one of the parties to the action pay such costs; and they have already had enough to pay.

[On the 20th September, 1915, the appeal came again before the Divisional Court; and, leave to appeal on the question of costs having been refused as above, the appeal was dismissed with costs.]

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HIBBARD  
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OF YORK.

[IN CHAMBERS.]

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Sept. 16.

SIMPSON v. GENSER.

*Arrest—Fraudulent Debtors Arrest Act, R.S.O. 1914, ch. 83, sec. 3(1)—Proof of Debt and Intent to Quit Ontario and Intent to Defraud—Evidence—Questions of Fact—Intent to Leave without Providing for Debts—Effect of—Arrest of Defendant and Subsequent Discharge.*

In order for the arrest of a defendant for debt, under the Fraudulent Debtors Arrest Act, R.S.O. 1914, ch. 83, ought not to issue until the plaintiff has fully proved: (1) an indebtedness to him by the defendant of not less than \$100; (2) that the defendant is about to quit Ontario; (3) with intent to defraud his creditors generally or to defraud the plaintiff only (sec. 3 (1) of the Act); and whether or not these three things are proved is as to each a question of fact.

The fact that the quitting is about to take place without any provision being made for the payment of debts may, in certain circumstances, be evidence of a fraudulent intent; but it is not always nor necessarily so. The Act does not provide for the arrest of persons about to quit Ontario without paying their debts; and it is not to be treated as if it did.

*Tooth v. Frederick* (1891), 14 P.R. 287, and *Coffey v. Scane* (1894-5), 25 O.R. 22, 22 A.R. 269, considered and reconciled.

Upon the facts stated by the plaintiffs on affidavits, an *ex parte* application for an order for the arrest of the defendant was granted; the defendant was arrested; but was afterwards discharged from custody, upon his own application, shewing a different state of facts.

MOTION made *ex parte* by the plaintiffs for an order, under the Fraudulent Debtors Arrest Act, R.S.O. 1914, ch. 83, for the arrest of the defendant.

Section 3(1) of the Act provides: "Where a person by affidavit of himself or some other person shews to the satisfaction of a Judge of the Supreme Court or of a County Court that he has a cause of action against a person liable to arrest to the amount of not less than \$100, and also such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that such person unless he be forthwith apprehended is about to quit Ontario with intent to defraud his creditors generally or the applicant in particular, the Judge may



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order that the person against whom the application is made shall be arrested and shall give security for such sum as the Judge thinks fit."

September 16. The motion was heard by MEREDITH, C.J.C.P., in Chambers.

*T. S. Elmore*, for the plaintiffs.

MEREDITH, C.J.C.P. (on the same day) :—The extraordinary process which the plaintiffs seek in this application, that is, an *ex parte* order for the arrest of the defendant for debt, under the Fraudulent Debtors Arrest Act, ought not to issue until the applicants have fully complied with the provisions of the enactment; and that is, have proven an indebtedness by the defendant to them in amount not less than \$100, and that the defendant is about to quit Ontario with intent to defraud his creditors in general or to defraud the plaintiffs only.

Whether or not these three things—debt, leaving, and intent—are proved, is as to each a question of fact; and none the less so because Judges or Courts may indicate their views respecting circumstances which they consider "badges of fraud"—generally circumstances which every one would deem evidence, more or less weighty, according to the other circumstances of the case, of fraudulent intention; and, being entirely questions of fact, the finding in no case is really binding in any other case.

Overlooking these things is, I think, accountable for a great deal, if not all, of the seeming want of unanimity in the judgments upon the subject; the supposed conflict of cases, it may be said.

How can the question whether a person is or is not about to quit the Province be generally anything but a pure question of fact; and equally, if not more, so, the question whether the leaving is for the purpose of cheating creditors out of the money owed to them?

That the fact that the quitting is about to take place without any provision for payment of debts being made may, in certain circumstances, be proof of the fraudulent intent, is quite true;

but to say that it is always so would be obviously untrue: for instance, a debtor unable to pay by remaining in the Province, but enabled, and really intending, to pay with money earned or acquired out of the Province, could not be said, with any pretence of truth, to be going with intent to defeat the claims against him. The Act does not provide for the arrest of persons about to quit the Province without paying their debts; and I have no power to treat it as if it did. And so, although sometimes dealt with, or at least spoken of, as conflicting cases, there is no good reason, that I can perceive, why such cases as *Toothe v. Frederick* (1891), 14 P.R. 287, and *Coffey v. Scane* (1894-5), 25 O.R. 22, 22 A.R. 269, may not both have been well decided.

With the additional evidence now furnished, the plaintiffs have, in my opinion, brought this case within the provisions of the Act in regard to the debt, which, if the testimony is true, is not barred by the Statute of Limitations, and is the debt of the defendant, as well as in regard to the defendant's intention to quit Ontario, and also in regard to the intention to defraud creditors; which intention, if the testimony be true, seems to be a perennial condition of mind of the defendant.

The application is necessarily made *ex parte*; and it may be that the defendant can prove facts and circumstances throwing a very different light upon the case; but in the meantime I am obliged to deal with it without any such light, if any such there be—a light which the defendant may, if he can, supply on an application, that I am willing to hear at any time, to discharge him out of custody; and an application which can be made within the twenty-four hours after arrest, in which, on the easy terms provided by the Act, the defendant may remain free from imprisonment.

A copy of the order for arrest, and of these reasons on which it is based, should be given to the defendant as soon as possible.

[The defendant was arrested on the 17th September; and he thereupon applied in Chambers, upon affidavits and on notice, under sec. 25 of the Fraudulent Debtors Arrest Act, for an order that he be discharged from custody, on the ground that he did not intend to leave Ontario. The motion was heard by MIDDLETON, J., on the 18th September; the defendant was examined in Chambers before the Judge; and an order was thereupon made discharging the defendant from custody.]

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[IN CHAMBERS.]

Sept. 21.

## REAUME V. CITY OF WINDSOR.

*Appeal—Supreme Court of Canada—Time for Giving Security—Extension—“Special Circumstances”—Supreme Court Act, R.S.C. 1906, ch. 139, secs. 69, 71.*

The plaintiffs, desiring to appeal to the Supreme Court of Canada from a judgment of the Appellate Division of the Supreme Court of Ontario, gave notice to the defendants, within the 60 days allowed by sec. 69 of the Supreme Court Act, R.S.C. 1906, ch. 139, of their intention to appeal, but did not give the requisite security until 13 days after the expiry of the time. The delay was caused partly by the illness of one of the plaintiffs, and partly by a misapprehension of some person in the office of the plaintiffs' solicitors as to the running of the 60 days in vacation; but it was shewn that the plaintiffs had, within the 60 days, given definite instructions to proceed with the appeal; and the amount in dispute was large enough to permit of an appeal to His Majesty in His Privy Council:—

*Held*, that “special circumstances” existed which justified an extension of the time under sec. 71 of the Act; and an order was made approving of the security and allowing the appeal—the plaintiffs paying the defendants' costs of the application and agreeing to expedite the appeal.

MOTION by the plaintiffs for an order allowing their appeal from the judgment of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, dated the 15th June, 1915, 8 O.W.N. 505, although the appeal was not brought within the time fixed by sec. 69 of the Supreme Court Act, R.S.C. 1906, ch. 139.

By sec. 69: “Except as otherwise provided, every appeal shall be brought within 60 days from the signing or entry or pronouncing of the judgment appealed from.”

By sec. 71: “Notwithstanding anything herein contained, the Court proposed to be appealed from, or any Judge thereof, may, under special circumstances, allow an appeal, although the same is not brought within the time hereinbefore prescribed in that behalf. . . .”

By sec. 72: “No writ shall be required or issued for bringing any appeal in any case to or into the Court, but it shall be sufficient that the party desiring so to appeal shall, within the time herein limited in the case, have given the security required and obtained the allowance of the appeal. . . .”

By sec. 75: “No appeal shall be allowed until the appellant has given proper security, to the extent of \$500, to the satisfac-

tion of the Court from whose judgment he is about to appeal, or a Judge thereof. . . ."

The motion was heard by MACLAREN, J.A., in Chambers.

A. W. Langmuir, for the plaintiffs.

E. D. Armour, K.C., for the defendants.

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September 21. MACLAREN, J.A.:—The plaintiffs move for allowance of their appeal to the Supreme Court of Canada from a judgment of the Appellate Division, notwithstanding it was not brought within the 60 days fixed by sec. 69 of the Supreme Court Act. Such allowance can only be granted "under special circumstances:" sec. 71 of the Act. It does not suggest what circumstances are sufficient, and there is a scarcity of authority on the point. The circumstances in this case are, that notice of intention to appeal was given to the respondents within the 60 days, but security was not given until 13 days after the expiry of the time. The delay was caused partly by the illness of one of the plaintiffs, who resides at a distance, and partly by a misapprehension in the office of the solicitors that the delay did not run during vacation. It is established by affidavit that the plaintiffs had given definite instructions within the 60 days to proceed with the appeal, and, as mentioned, notice was actually given within the prescribed time.

In *Smith v. Hunt* (1902), 5 O.L.R. 97, the late Chief Justice of this Court said: "Upon an application of this nature it lies upon the applicant to shew, amongst other things, a *bonâ fide* intention to appeal, held while the right of appeal existed, and a suspension of further proceedings by reason of some special circumstances." See also *In re Manchester Economic Building Society* (1883), 24 Ch. D. 488, at p. 497, and *Haydon v. Cartwright*, [1902] W.N. 163.

The amount in dispute in this case is large enough to allow the case to be taken to the Privy Council; so that it would be more expeditious and less expensive to have the appeal to the Supreme Court proceeded with.

In the circumstances, I would extend the time, approve of the security, and allow the appeal. The appellants should agree to expedite the appeal, and should pay the costs of the application.

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[CLUTE, J.]

Sept. 22.

BRUNSWICK BALKE COLLENDER CO. OF CANADA LIMITED v.  
FALSETTO.

*Sale of Goods—Manufacture by Vendors—Refusal of Purchaser to Accept  
—Breach of Contract—Damages—Absence of General Market—Profits.*

The defendant ordered from the plaintiffs certain goods of the style and kind manufactured by the plaintiffs, as described and at the price and upon the terms stated in a written order. The goods were ready for shipment on the date fixed for delivery; but the defendant, before they were shipped, assumed to cancel the order, and demanded the return of a part of the price which he had paid in cash. The goods did not leave the possession of the plaintiffs, nor did they sell or attempt to sell them. In an action for damages for breach of the contract, the evidence shewed that the goods could have been sold, within a short time after the breach, at a price equal to that named in the order:—

*Held*, that the plaintiffs were entitled to be put in the same position as if the contract had been performed; and, as it did not appear that there was a general market fixing the price of goods of the kind bargained for, they should recover as damages the profits they would have made upon the sale to the defendant—ascertained by deducting from the contract price the cost of production ready for delivery.

*In re Vic Mill Limited*, [1913] 1 Ch. 183, followed.

ACTION for damages for breach of a contract.

September 21. The action was tried by CLUTE, J., without a jury, at Toronto.

A. A. Macdonald, for the plaintiffs.

No one appeared for the defendant.

September 22. CLUTE, J.:—On the 16th June, 1914, the defendant gave a written order for four billiard tables of the style and kind manufactured by the plaintiffs, as described in the order; price, \$985; insurance, \$26.16; total, \$1,011.16; property to remain in the vendors until notes and lien fully executed: terms, \$311.16 cash, balance in 16 months; \$50 cash was paid on account. The goods were to be shipped "when notified, about July 10th," 1914. The goods were ready for shipment on the date for delivery. On the 13th July, 1914, the defendant cancelled the order and asked for return of the \$50. The goods did not leave the possession of the plaintiffs, nor did they sell them or try to sell them. The plaintiffs' evidence shews that the goods might probably have been sold within a short time after

the order was cancelled. The actual expense incurred by the plaintiffs in packing and unpacking the goods, storage, insurance, etc., would not exceed \$50; and, the evidence before me being that the goods could have been sold at a price equal to the purchase-price, \$50 would cover the plaintiffs' claim unless they are entitled, as they claim, to the profits on the sale.

The actual cost of the goods to the plaintiffs is \$473.60. This would leave a profit of \$511.40, which the plaintiffs claim.

Under the general rule in case of breach of contract, the plaintiffs are entitled to be put in the same position as if the contract had been performed. A recent case bearing upon this question is *In re Vic Mill Limited*, [1913] 1 Ch. 183. Neville, J., after referring to the general rule, said, with reference to the goods which were not made: "I think it is obvious, if you are putting the claimants in the same position as they would have been in if they had fulfilled their contract, you can do that in one way only, and that is by giving them the profits they have lost, and, in such a case, that must be the beginning and end of the matter. With regard to the goods that had been manufactured, the question is whether there was an available market for the goods. I think there obviously was not. If the claimants had done what it was suggested they ought to have done, sold against the liquidating company, the result would, in my opinion, have been that the damages would have amounted not only to the loss of profit, but probably to the whole, or nearly the whole, cost of manufacture as well. . . . It seems to me goods made to order stand on quite a different footing from other goods because they are not made for the market. It may be there is an available market and it may be there is not; but, as a rule, if you sell against the purchaser you put him in a great deal worse position than the claimants claim to put him in in the present case." And he held that the plaintiffs were entitled to the profits upon the goods already manufactured, as well as those which were not made up.

In the present case it does not appear that there is a general market fixing the price of goods of this kind, but that sales by the plaintiffs were by order. See also Benjamin on Sale, 5th ed., p. 812; *Silkstone and Dodsworth Coal and Iron Co. v. Joint-*

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*Stock Coal Co.* (1876), 35 L.T.R. 668; followed in *Todd v. Gamble* (1896), 148 N.Y. 382; *Cort v. Ambergate etc. R.W. Co.* (1851), 17 Q.B. 127.

This case is, I think, distinguished from that class of cases where there is a general market price. I do not see how, in this case, the plaintiffs can be placed in the same position that they would have been in if the contract had been performed, without taking into account the profits they would have made upon the sale. These profits are ascertained by deducting the cost of production ready for delivery from the cost price. The plaintiffs are not entitled in this case to the expense of packing, as that would have been necessary if the contract had been carried out, nor to the incidental expense of travelling to North Bay to take the order.

The \$50 should, therefore, be deducted from the \$511.40, and judgment should be entered for \$461.40, with County Court costs, without a set-off.

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Sept. 24.

[IN CHAMBERS.]

RE PINSONNEAULT.

*Life Insurance—Disappearance of Beneficiary—Endorsement Made by Insured in Favour of Beneficiary two Years after Disappearance—Presumption of Death—Trust — Time for Commencement of Seven-year Period—Improbability of Absentee Communicating with Friends — Effect on Presumption—Evidence—Onus.*

If it is proved that for a period of seven years no news of a person has been received by those who would naturally hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead. *Sed quære*, whether the presumption applies to the case of a person who would have been unlikely to communicate with his friends.

Review of the authorities.

A young man disappeared in 1907, and had not since been heard of, so far as appeared, though inquiries had been made and advertisements published asking him to communicate with his family. There was evidence that he had said good-bye to some of his relations and told them that they might never see him again. He was (and was aware of the fact) one of the beneficiaries named in a policy of insurance on the life of his father, existing at the time of his disappearance. By an endorsement made two years after the disappearance, the father re-apportioned the benefits under the policy, giving the son who was absent a larger share. The father died in 1912:—

*Held*, that the endorsement was in effect a declaration of trust in the son's favour, he being designated by name; he must be taken to have been

living at the date of the endorsement, the onus of proving death before that date being upon the representatives of the father; and, therefore, death ought not to be presumed until the lapse of seven years from the date of the endorsement.

*In re Corbishley's Trusts* (1880), 14 Ch.D. 846, followed.

An order was made permitting the insurance society to pay into Court the share of the insurance moneys designated for the son; and directing that, if no further information could be obtained, the money should, at the expiration of seven years from the date of the endorsement, be paid out and distributed upon the theory that the son did not survive the father: the onus is upon the representatives of a beneficiary to prove that he survived the insured.

*Re Phillips and Canadian Order of Chosen Friends* (1906), 12 O.L.R. 48, followed.

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MOTION by the widow of Napoleon Pinsonneault, deceased, and the next of kin of Hector Pinsonneault, an absentee, upon originating notice, for an order determining the person or persons entitled to a sum of \$1,000 payable by the Catholic Mutual Benefit Association, under a benefit certificate or policy of insurance upon the life of Napoleon Pinsonneault, to his son, the absentee.

September 21. The motion was heard by MIDDLETON, J., in Chambers.

*B. N. Davis*, for the applicants.

*G. Lynch-Staunton*, K.C., for the Catholic Mutual Benefit Association.

September 24. MIDDLETON, J.:—The late Napoleon Pinsonneault had been for many years a member of the Catholic Mutual Benefit Association and the holder of a policy therein. This policy lapsed, but he was reinstated in membership, and a new policy issued on the 3rd December, 1909. This policy, for \$2,000, was made payable \$500 to his wife Zuluma and \$500 to each of the sons, Joseph, Louis, and Hector. By endorsement bearing date the 14th December, 1909, this direction as to payment was revoked and the policy was made payable to the wife and to Hector, each \$1,000.

Napoleon Pinsonneault died on the 8th February, 1912. The \$1,000 payable to his wife has been paid to her. The remaining \$1,000 is retained by the association; and this originating notice is for the purpose of determining who is entitled to receive the same.

It appears that Hector Pinsonneault was the son of Napoleon



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by a former wife. He lived with his father and stepmother until 1907. In August, 1907, Pinsonneault and his wife visited Montreal for some three weeks. Upon their return to Chatham, they found that Hector, who had been staying with a married half-brother, a child of Napoleon's first wife—for he was three times married—had left for parts unknown. He had said good-bye to his relations there and told them that they might never see him again. It was found that Hector had purchased a ticket to Detroit, and had gone to his home in Chatham and had taken all his clothes, his trunk, a bicycle, and other articles belonging to himself, and had cut from the frame and taken with him a photograph of his maternal grandmother.

Hector sometimes visited relatives living in Detroit, and inquiry was made of them, but no information could be acquired. From that time, although many inquiries have been made, no information has been obtained.

At this time Hector was twenty years of age. He was in good health; he had left school about a year previously, and during the year had been working with some cigar manufacturers, with the intention of learning the business. He is described as being a quiet boy, a great reader, happy at home, and getting on well with all the members of the family, but he was dissatisfied with his employment. As a child he had had hip disease, which left one leg shorter than the other, and he walked with a crutch or cane and had a high heel on one of his shoes.

It is said that he knew that he was a beneficiary under his father's life policy. After the father's death, advertisements were inserted in two Detroit newspapers and in the *Toronto Globe* for a period of three months, stating that the father was dead, that Hector had been left \$1,000 under the insurance policy, and asking him to communicate with his family. To these advertisements there has been no response.

Upon this state of affairs I am asked to infer that Hector Pinsonneault is now dead and to direct payment over of the insurance money accordingly.

The rule evolved from the many cases dealing with presumption of death is found in Halsbury's *Laws of England*, vol. 13, p. 500, where, after pointing out that there is no presumption

of continuance of life, but there is a presumption concerning death, the writer says: "For if it is proved that for a period of seven years no news of a person has been received by those who would naturally hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead."

Following this formulation of the principle is found the statement (p. 502): "The presumption of death has been thought to be confined to cases where there are in evidence no circumstances which afford ground for a different conclusion; and it has accordingly been held to have no application to the case of a person who would have been unlikely to communicate with his friends. More recent decisions, however, appear to throw doubt on this restriction."

It is singular that this qualification of the rule does not appear to have been much discussed in the numerous cases dealing with the subject. The earlier cases referred to are *Watson v. England* (1844), 14 Sim. 28, and *Bowden v. Henderson* (1854), 2 Sm. & G. 360.

In the earlier case a girl of sixteen or seventeen, for no apparent reason, left her father's house to go no one knew whither. Some four years later, she was seen at Portsmouth, and then stated that she intended to go abroad. From that time on nothing was heard of her. After seven years had elapsed, an inquiry was directed to ascertain if she were dead. On appeal from the report of a Master finding that she was dead, Knight-Bruce, V.-C., said, after reciting these facts: "It is but reasonable to presume that, all along, she had been concealing herself, and that she never intended to return home. . . . The circumstances of the case make it very probable that she would never be heard of again by her relations."

In *Bowden v. Henderson*, the Vice-Chancellor says: "The principle on which the Court presumes the death of a person of whom no tidings have been received for a long period of time is this,—that, if he were living, he would probably have communicated with some of his friends and relatives. It is a conclusion which the Court draws from the probabilities of the case. It is quite clear, therefore, that, when no such probability exists, the

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presumption cannot arise." Therefore, where a young woman left her friends under circumstances which caused them to re-monstrate with her and reproach her for doing so, it was thought that the absence of communication raised no presumption of death.

*In re Phene's Trusts* (1870), L.R. 5 Ch. 139, is the leading case upon the subject, but in that case the particular question now suggested did not really arise. The testator died in 1861. His nephew Nicholas had disappeared in 1860. In 1870, a question was raised as to the distribution of the testator's estate, the residue being divisible among his nephews and nieces in equal shares. There was no doubt that under the circumstances Nicholas was to be presumed to be dead, but the real difficulty was whether his death took place before or after the death of the testator. The holding was that there was no presumption that he was dead at any particular time during the seven years, and that the onus of proving that death took place at any particular time within the seven years was upon the person who claimed a right to the establishment of which that fact was essential. Therefore, the personal representative of Nicholas failed to establish any right to share in the testator's estate, for he had not proved that Nicholas survived the testator.

I have mentioned this case before referring to the two cases relied upon in Halsbury as supporting the statement that the rule acted upon in *Watson v. England* and *Bowden v. Henderson* had been departed from, for the purpose of shewing precisely the point there decided.

The two cases which are supposed to have effected this change in the law are *Willyams v. Scottish Widows Fund Life Assurance Society* (1888), 52 J.P. 471, and *Wills v. Palmer* (1904), 53 W.R. 169.

In the first of these cases an action was brought upon an insurance policy. The insured had largely overdrawn his bank account, had placed a mortgage upon his life interest in his wife's property, had quarrelled with his wife, "and suddenly disappeared with a nursemaid." After seven years waiting the wife sued the insurance company. Stephen, J., thought the absence and the silence established death. The matter is dealt with very

shortly: "I must come to the conclusion in this case that Hall is dead. . . . I cannot presume that he had committed the crime of bigamy."

In the second case, a solicitor had disappeared. He was an absconding debtor, and possibly worse. Kekewich, J., says: "Mr. Stewart Smith says there is reason to think he is not dead, as it is his interest to conceal himself from both friends and enemies, and therefore his death is not to be presumed. But I do not understand that to be the law. In *Phene's Trusts*, Giffard, L.J., in a long and instructive judgment, after having referred to three cases decided by Kindersley, V.-C., says: 'They were all decided on the same general principles . . . that the law presumes a person who has not been heard of for seven years to be dead.'"

If the judgment in *In re Phene's Trusts* is looked at, it will be quite clear that what Lord Justice Giffard meant by the statement quoted was that death was to be presumed at the end of the seven years of unexplained absence, and not at any particular time during the seven years; e.g. (L.R. 5 Ch. at p. 149): "Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died. . . . It is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed."

There is, however, another principle which appears to me to have application in this case. Two years after this young man's disappearance, the father executed the endorsement upon the policy changing the son's share from \$500 to \$1,000. This was in effect a declaration of trust in his favour, he being designated by name. It was held in *In re Corbishley's Trusts* (1880), 14 Ch. D. 846, that where a trust is declared in favour of a named person, such person must, until the contrary is shewn, be taken to have been living at the date of the deed; the onus of proving death before that date being upon the representatives of the settlor.

The stepmother states her belief that the father had no word of his son at any time; but he may well have had knowledge unknown to her; and I do not think that death ought to be presumed until the lapse of seven years from the date of the endorsement.

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The insured being now dead, an order may be made upon this application permitting the money to be paid into Court and discharging the society from all liability; and, if no further information can be obtained, the money will be paid out on the expiration of that period and distributed upon the theory that the son did not survive his father; for it has been determined in *Re Phillips and Canadian Order of Chosen Friends* (1906), 12 O.L.R. 48, that the onus is upon the representatives of a beneficiary to prove that he survived the insured.

If the insurance money is now paid into Court, the costs of both parties may be paid out of the fund, and the fund will remain in Court until after the 14th December, 1916.

In the meantime the material ought to be supplemented, if possible, by a copy of the advertisement published, and by giving detailed information as to the publication.

Great care is necessary where death is sought to be presumed on the evidence of those who profit by its establishment. One cannot help recalling the case of the lady in Scott's poem who claimed "the praise to constant matron due," but who anxiously awaited the expiry of the seven years' limit of the disappearance of her husband so as to avoid a bigamous marriage—who anxiously and expectantly announced,

"For, count the term howe'er you will, so that you count aright,

"Seven twelvemonths and a day are out when bells toll twelve to-night."

[MIDDLETON, J.]

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RE RUTHERFORD.

Sept. 24.

*Executors and Administrators—Claim upon Estate of Intestate—Promise to Provide for Claimant by Will—Evidence—Corroboration—Service of Claimant for Long Period—Wages—Confinement to 6 Years—Limitations Act, R.S.O. 1914, ch. 75, sec. 49 (g)—Waiver by Administrator—Rights of Beneficiaries—Contest in Surrogate Court—Beneficiaries Made Parties—Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 69 (5).*

After the death of R., a claim for \$6,000 was made upon his estate by a woman who alleged that R. had promised to compensate her by his will for her services to him during a period of 20 years. R. died intestate, and the administrator of his estate notified the claimant, under sec. 69 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, that he disputed her claim; whereupon she applied to the Judge of a Surrogate Court for an order allowing her claim; and he, upon evidence adduced, and after hearing not only the claimant and the administrator but the next of kin of the intestate, allowed the claim to the extent of \$2,340, being at the rate of \$2.25 per week for the period of 20 years. The evidence of the claimant—which was amply corroborated—was that she remained with R., and worked for him, in reliance upon his promise "that he had plenty and could do for me as if I were his own girl; he would provide for me, and I did not have to go away and earn:"—

*Held*, upon the appeal of the next of kin, that, although the words of the promise were not clear, the Judge was justified in inferring that what was intended was that the claimant should be provided for, not only during R.'s lifetime, but also by his will.

*Held*, however, that the Judge should have given effect to the Limitations Act, R.S.O. 1914, ch. 75, sec. 49 (g), and confined the allowance to a period of 6 years before the death: the administrator might not choose to take advantage of the statute; but, the matter having been brought into Court, the beneficiaries, who had a *locus standi* under sec. 69 (5), had the right to insist upon the statute.

*In re Wenham*, [1892] 3 Ch. 59, applied.

JAMES RUTHERFORD died on the 11th January, 1915, intestate. Letters of administration of his estate and effects were issued by the Surrogate Court of the County of Haldimand to Alexander Dunnett.

On the 3rd July, 1915, a claim against the estate of the intestate was lodged with the administrator by Florence Harding, as follows: "To amount which deceased promised the claimant as compensation for her living with the deceased at his request, \$6,000."

On the 5th July, 1915, the administrator notified the claimant that, under sec. 69\* of the Surrogate Courts Act, R.S.O. 1914,

\*69.—(1) Where a claim or demand is made against the estate of a deceased person which, in the opinion of his personal representative, is unjust, in whole or in part, or where such personal representative has notice of such a claim or demand, he may, at any time before payment, serve the

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ch. 62, he disputed her claim; and that he also contended that the portion of the claim arising more than 6 years before these proceedings were taken was barred by the Limitations Act.

Upon the application of the claimant, the acting Judge of the Surrogate Court appointed a time and place for hearing, determining, and adjudicating upon the claim, and ordered that a copy of the appointment should be served on the next of kin of the intestate.

Pursuant to the appointment, the claimant, the widow and the two sisters of the intestate, and the administrator, appeared before the Judge, and thereupon evidence was taken, and the parties heard.

The Judge on the 9th August, 1915, ordered and adjudged that the claimant should recover against the estate of the intestate the sum of \$2,340, and costs to be taxed.

The learned Judge gave reasons as follows:—

I find from the evidence adduced that the claimant was persuaded to remain at the home of the deceased, and to perform the services that she did perform, on the understanding and with the expectation and intention of both parties that the deceased would compensate the claimant by his will.

It is not so clearly established under what circumstances she came to live with the deceased, but it is abundantly clear that, after she had been there, the deceased made it plain that she would be remunerated if she remained.

I think the case cannot be distinguished from *Walker v.*

claimant with a notice in writing that he contests the same in whole or in part, and, if in part, stating what part and also referring to this section.

(2) Subject to the provisions of sub-section 3, the claimant may thereupon apply to the Judge of the Surrogate Court out of which the probate or letters of administration of the estate issued, for an order allowing his claim and determining the amount of it, and the Judge shall hear the parties and their witnesses and shall make such order upon the application as he may deem just, and if he does not make such application within thirty days after receiving the notice or within such further time as the Judge either before or after the expiration of the thirty days may allow, he shall be deemed to have abandoned his claim, and the same shall be forever barred.

(5) Where the application is made to the Judge of the Surrogate Court, in addition to the persons to whom notice has been given, any other person who is interested in the estate shall have the right to be heard and to take part in the proceedings.

*Boughner* (1889), 18 O.R. 448; and I know of no case where the amount allowed to a claimant, under the circumstances before us, was such sum as the claimant might or would have earned in an occupation from which such claimant was influenced from entering into. The claimant is entitled to such sum as is a reasonable remuneration for her services. The widow of the deceased very plainly made it appear that she regarded the services as valuable, and explained that the claimant assisted her in the housework on a large farm, in milking, baking, washing, and such like, and, while living in the village, took care of the garden and lawn. It also appears that, while the widow was ill, the claimant nursed her and performed practically all the household duties, and also nursed the deceased during his illness.

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No evidence was given of the value of such services, nor what would have had to be paid for similar services. The widow says that for 20 years the claimant was as valuable as any girl could be. During the 20 years she received her board and clothing, and was absent a short time taking a course at the business college, for which the deceased paid. Having regard to all the circumstances, and to the duties performed by the claimant during the whole period of 20 years, and considering what the home and maintenance provided for the claimant should be valued at, I find that the claimant is entitled to an allowance of \$2.25 per week for the period of 20 years.

I do not think that the beneficiaries have a right to set up the Statute of Limitations, as the administrator refused to set up such a defence, and merely submitted his right to the Court; and I, therefore, allow remuneration for the whole 20 years. But, if the claimant should be entitled to 6 years' remuneration only, I think the allowance of \$2.25 per week is not sufficient, as it was during the last 6 years that the most of the sickness occurred, and the claimant had more care and responsibility on that account, and it was before the last 6 years that the claimant was absent at the business college.

I allow the claim at \$2,340 and costs, and allow the administrator his costs as between solicitor and client.



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The sisters of the intestate, Annie Fleming and Bertha Cranston, appealed from the order or judgment of the acting Surrogate Court Judge, upon the following grounds:—

(1) That the learned Judge erroneously found that the appellants were not at liberty to plead the Statute of Limitations.

(2) That there was no evidence on which the learned Judge could find that the deceased had promised to provide for the claimant by his will.

(3) That there was no evidence on which the learned Judge could find that the value of the claimant's services was \$2.25 per week in addition to her home and maintenance.

(4) That the learned Judge should have taken into consideration the value of the clothing provided for the said claimant, and the value of a piano which the claimant claims as her own.

(5) That, if the claimant is entitled to any wages prior to 7 years ago, the estate of the deceased is liable to pay only one-half of the said wages.

(6) That the learned Judge should not have allowed wages during the time the claimant was away from home, and should have deducted the amount paid by the deceased for the claimant during the time she was taking a course at the business college.

(7) That the learned Judge should have allowed the appellants their costs.

September 23. The appeal was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*R. S. Colter*, for the appellants.

*S. E. Lindsay*, for the administrator.

*H. Arrell*, for the claimant.

The widow appeared in person.

September 24. MIDDLETON, J.:—Appeal by the next of kin from the decision of the Surrogate Judge, allowing the claimant against the estate \$2,340 and costs, being wages at the rate of \$2.25 per week for a period of about 20 years.

Upon the evidence of the claimant, she remained with the late Mr. Rutherford, and worked for him, in reliance upon the promise of the intestate "that he had plenty and could do for

me as if I were his own girl; he would provide for me, and I did not have to go away and earn." This promise is amply corroborated by witnesses, particularly the widow; and, although the words of the promise are not particularly clear, I think the Judge was amply justified in inferring that what was intended was that the claimant should be provided for not only during Rutherford's lifetime but also by his will.

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Objection is taken to the amount allowed. I do not think it at all excessive. If there is any error, I incline to think that it is on the other side. No doubt, the Judge had perfectly present to his mind that this sum was being allowed in addition to whatever the claimant received by way of clothing or otherwise.

On the other hand, I think the Judge should have given effect to the Statute of Limitations,\* and that the allowance should be confined to 6 years. The learned Judge has taken the view that the administrator, who is friendly to the claimant and does not desire to plead the Statute of Limitations, can waive the statute, notwithstanding the wishes of those beneficially interested. It may be that, if the administrator had paid the debt before any contest had taken place in the Courts, the beneficiaries would be bound; but here the matter has been brought into Court, and the beneficiaries have, I think, the right to insist upon the statute.

In *In re Wenham*, [1892] 3 Ch. 59, it was held that where an originating summons had been issued the parties must be treated as standing in the same position as if an administration decree had been made, and that consequently the residuary legatee was entitled to insist upon the statute as a defence to a creditor's claim. *A fortiori* must this be so where, as here, the statute expressly gives a *locus standi* to those beneficially interested upon the summary contest provided: R.S.O. 1914, ch. 62, sec. 69(5). See also *Midgley v. Midgley*, [1893] 3 Ch. 282.

The amount of the claim will therefore be reduced to the remuneration for 6 years, and costs of all parties will be paid out of the estate.

\*See R.S.O. 1914, ch. 75, sec. 49 (g).

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[IN CHAMBERS.]

Sept. 28.

RE MCNEILLY V. BENNETT.

*Division Courts—Territorial Jurisdiction—Cause of Action, where Arising—Contract—Correspondence—Division Courts Act, R.S.O. 1914, ch. 63, sec. 72—Prohibition.*

The plaintiff, who had an establishment in the city of H., sent from there a copy of a circular letter to the defendant at the town of O., where she lived, advising her to send in old hat shapes to be reshaped, and quoting prices. In response to this, the defendant sent from O. to the plaintiff at H. some hats to be reshaped, accompanied by a letter. The plaintiff said that he reshaped the hats and returned them; he sued for the price in the Division Court at H.; the defendant disputed his claim; and the Judge in the Division Court at H. ordered that the action should be transferred to the Division Court at O.:—

*Held*, that the cause of action did not arise wholly in H., but partly in O.: the receipt of the circular letter at O. was a part of the cause of action, although the letter did not amount to a technical offer; and the writing of the letter accompanying the goods from O. was also a part of the cause of action.

*In re Hagel v. Dalrymple* (1879), 8 P.R. 183, approved as according with the policy of the Division Courts Act, and followed.

*Cowan v. O'Connor* (1888), 20 Q.B.D. 640, not followed.

Motion for prohibition to prevent the transfer of the action to O. refused.

MOTION by the plaintiff in an action in the First Division Court in the County of Wentworth for an order prohibiting the defendant and the Judge and Clerk of the Division Court from proceeding to transfer the action from that Court to the Sixth Division Court in the County of Simcoe, and for a mandamus to compel the Judge to try the action in the Wentworth Division Court.

The plaintiff lived at Hamilton, within the territory of the First Division Court in the County of Wentworth, and the defendant at Orillia, within the territory of the Sixth Division Court in the County of Simcoe. The action was begun in the Wentworth Division Court; when it came on for trial, the Judge presiding made an order for its transfer to the Simcoe Division Court.

The plaintiff asserted that the whole cause of action arose at Hamilton.

The action was for the price of certain work done for the defendant by the plaintiff at Hamilton. The correspondence between the parties is referred to in the judgment.

September 24. The motion was heard by MIDDLETON, J., in Chambers.

*T. N. Phelan*, for the plaintiff.

*J. M. Ferguson*, for the defendant.

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September 28. MIDDLETON, J.:—Motion for an order prohibiting the transfer of this action from the First Division Court in the County of Wentworth to the Orillia Division Court, and for a mandamus to compel the Wentworth Judge to hear and determine the action upon its merits.

The amount involved in this matter is trifling, but the question is not free from difficulty. McNeilly has an establishment in Hamilton, and part, at any rate, of his business consists in reshaping ladies hats for retailers, so as to make unsold hats conform to new styles.

On the 2nd March, 1914, he sent what is said to be a circular letter to Mrs. Bennett: "This is the last request this season, advising you to send in your old hat shapes to be reshaped. Goods sent not later than the 16th March will be returned promptly. Our prices are fifty cents each for all kinds. . . . Send now."

In response to this invitation, the defendant did send some hats to be reshaped, and the controversy arises concerning the fulfilment of the obligation thus undertaken. The plaintiff says that he did reshape. The defendant says that what he sent her was not the same as that which she had sent for treatment.

The plaintiff sues in Hamilton, upon the theory that the whole cause of action arose there. The learned Judge has taken the view that the whole cause of action did not arise in Hamilton, but partly in Orillia.

Two questions are really involved:—

In the first place, is the receipt of the circular firstly mentioned any part of the cause of action? It is argued, on the strength of *Johnston Brothers v. Rogers Brothers* (1899), 30 O.R. 150, that the latter was a mere quotation of prices, and that the sending of the goods in response to it did not complete a contract, it being necessary that there should be some further assent on the part of the plaintiff. It may be that this is correct; but, nevertheless, in my view, the sending of the circular

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letter did constitute part of the cause of action. The plaintiff initiates the transaction by making this quotation of prices in Orillia; and, although this did not amount to a technical offer, it is, I think, an essential ingredient in the "cause of action," as that expression has been consistently defined in all the cases relating to this subject.

The second aspect of the case is not important if I am right in the view just expressed. It is this: that the writing of the letter accompanying the goods from Orillia is in itself a part of the cause of action; and in support of this is the decision of the late Chief Justice Hagarty in *In re Hagel v. Dalrymple* (1879), 8 P.R. 183, who held, in precisely analogous circumstances, that, if the defendant's letter written in Orillia is to be regarded as the plaintiff's authority for performing the services in Hamilton, the writing of the letter at Orillia became part of the cause of action within the meaning of the rule. I should be bound to yield allegiance to this decision even if I were satisfied that it was not entirely satisfactory.

The case relied upon by Mr. Phelan, *Cowan v. O'Connor* (1888), 20 Q.B.D. 640, appears to be in conflict with this decision; but our own decision is in accord with the policy of the Division Courts Act, which compels the creditor to seek his remedy in the Court of the residence of his debtor unless the whole cause of action arises in some other division.\* Where there is a *bonâ fide* dispute, it is always a hardship to one litigant to have to travel to the residence of his opponent for its adjustment. The legislative sympathy is entirely with the debtor, and the provisions of the Act ought to be interpreted accordingly.

The motion for prohibition will be dismissed, and costs will follow.

\*See the Division Courts Act, R.S.O. 1914, ch. 63, sec. 72.

[CLUTE, J.]

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Sept. 29.

## MCKINNON V. DORAN.

*Contract—Purchase of Bonds—Broker Becoming Purchaser—Finding of Fact—Evidence—Correspondence — Admissibility — Memorandum in Writing—Statute of Frauds—Breach of Contract—Damages—Actual Loss of Vendors.*

In an action for damages for breach of a contract to take and pay for a large number of bonds of a railway company, it was *held*, upon the evidence, that the defendant had constituted himself the actual purchaser of the bonds from the plaintiffs, although the defendant, who was a financial broker, was to receive from the plaintiffs a certain allowance in the nature of a commission by way of deduction from the price; the defendant acted not as agent, but as principal, in the transaction.

*Held*, also, that certain correspondence between the defendant and his associate, resident in a large financial centre, who was endeavouring to find a purchaser for the bonds, was admissible in evidence in the action, and was a sufficient memorandum in writing to satisfy the Statute of Frauds, R.S.O. 1914, ch. 102—it clearly disclosed the vendors and the terms of sale and the fact that the defendant was the purchaser.

*Gibson v. Holland* (1865), L.R. 1 C.P. 1, followed.

*Held*, also, that the plaintiffs were entitled to recover, as damages for the defendant's breach of his contract, the amount of their actual loss, measured by the price which they afterwards obtained for the bonds, which was the best price possible, having regard to the condition of the market.

*In re Vic Mill Limited*, [1913] 1 Ch. 183, followed.

ACTION for damages for breach of a contract, tried by CLUTE, J., without a jury, at Toronto.

J. B. Clarke, K.C., for the plaintiffs.

J. S. Fullerton, K.C., and I. F. Hellmuth, K.C., for the defendant.

September 29. CLUTE, J.:—The plaintiffs are bond and investment brokers, of Toronto. The defendant is a financial broker, residing in the city of Toronto. He had formerly been engaged in the real estate business, and prior to that in the whole-sale clothing business. The plaintiffs owned certain bonds of the Lacombe and Blindman Valley Electric Railway Company, of the par value of \$230,000, guaranteed by the Government of Alberta.

The plaintiffs, having become aware that the defendant had tendered for bonds issued by the City of Toronto, of the par value of \$1,000,000, approached the defendant with a view of selling to him their bonds, offering the same so as to yield 4.95

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per cent., with an additional reduction in price, or bonus as it is called, of \$1,150.

The defendant had formed a connection with one Daude, financial broker of New York, under an agreement with him to share the profit of any transactions they might have. The defendant called him a partner, and in a certain sense he was a partner.

Having received the plaintiffs' offer, together with a full printed statement of their holding (exhibit 1), he wrote Daude as follows, enclosing the statement: "May 26, 1914. Mr. Norman Davies, one of the firm of W. L. McKinnon and Company, bond dealers, of Toronto, called upon me to-day to see if I could handle \$230,000 worth of bonds of the Province of Alberta. They originally had \$250,000, but have disposed of \$20,000, leaving a balance which they now have of \$230,000. Selling price etc. explained in the enclosed circular. All the commission they can offer us is half of one per cent., which equals to us \$1,150. Can you handle these? If so, kindly let me know by wire."

The Davies referred to in the above letter called on Doran the following day and informed him that the bonds held by them were now reduced to \$223,700. The defendant said that would make no difference, and informed Davies, who represented the plaintiffs' firm, that he had received word from New York, and said that his New York correspondent required a further reduction in price, amounting in all to \$2,500 less than that mentioned in the circular. Davies went for Pettes, a partner of the plaintiffs' firm, who returned with him to the defendant, who then said that he would take the bonds, less \$2,500. This was on the 29th May, 1914.

Pettes having consulted with his partner McKinnon, they decided to sell the bonds at the price offered—that is, at the price which would yield 4.95 per cent. and accrued interest, less \$2,500.

Doran said it would be necessary for him to consult with his people in New York, which Doran did by telegram on the same day, as follows: "E. Daude, Hotel Martinique, New York. McKinnon will sell Alberta bonds \$223,700 less \$2,500 to us sub-

ject to Toronto payment and delivery. Small quantity sold since writing. J. J. Doran."

On the next day, the plaintiffs asked to have the transaction closed, and on the same day Doran telegraphed Daude: "McKinnon wants confirmation re Alberta bonds. Answer."

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On the 2nd June, the defendant received a telegram from his associate in New York, stating that the bonds were sold. Thereupon the defendant telephoned the plaintiffs that he would take the bonds, "on legality approved;" and the plaintiffs on the 2nd June wrote the defendant as follows: "Following your telephone conversation with our Mr. McKinnon, we take pleasure in confirming to you the sale of \$223,700 Province of Alberta (guaranteed) bonds bearing 5, payable semi-annually, maturing Oct. 22nd, 1943. The price is a rate to yield you 4.95, less an allowance to you of \$2,500. The legal opinion of J. B. Clarke, K.C., has already been obtained; however, the legal files are not as yet completed. Mr. Clarke is at present out of town, and upon his return, which is expected in a few days, we will take the necessary steps to have the legal papers completed and forwarded to you, in order that your solicitor may approve legality."

I find that this letter was written and mailed by the plaintiffs on the same day to the defendant, and I have no doubt that he duly received the same, for on the following day he wired to Daude as follows: "June 3rd, 1914. E. Daude, Hotel Martini-que, New York, N.Y. The Alberta bonds which you have particulars of no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once. J. J. Doran."

I find as a fact that during the entire correspondence and interviews between the plaintiffs and the defendant, including the last telegram, which was some time after, the plaintiffs were not informed who the financial agent acting with the defendant in New York was, nor were they informed of the proposed purchaser; and I further find that proofs of the legality of the bonds were duly furnished and approved, and no objection upon that score was subsequently raised, nor was there any ground



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for raising objection to their legality, nor is their legality denied in the pleadings.

There was delay in closing the transaction, for the reason that it appeared that Bloomingdale, to whom Daude, for the defendant, had agreed to sell the bonds, was informed by Harris Forbes & Co., bond brokers in New York, that the bonds had been offered to them and "turned down," and Bloomingdale thereupon refused to take them. The plaintiffs pointed out that this was no affair of theirs, as the sale had been made to the defendant, and insisted upon closing the transaction; and finally it was arranged between the defendant and the plaintiffs that the transaction should be closed, and a day was fixed, namely, the 16th June. On that day, Doran wired Daude that "the Alberta bonds must be paid for to-day." The defendant admits that he was prepared to close the transaction on that day if the money had arrived, and no objection was then made as to the legality of the bonds. Bloomingdale having failed the defendant and Daude, they made efforts to sell to other persons. In the meantime financial stringency increased; and, before the defendant was in a position to pay for the bonds, war was declared, after which the defendant was not able to find a purchaser.

There is considerable evidence and correspondence relating to an effort that was made to obtain a time-loan on the bonds, but the plaintiffs were careful to preserve their rights, and in no way compromised their legal position. I was perfectly satisfied with the truthfulness and accuracy of the plaintiffs' witnesses. They followed their usual course of business in making memoranda, at the time of telephone and other conversations, as to what took place, and I accept their evidence in preference to that of the defendant or his witness Daude wherever there is a difference.

The defendant pleads that he was employed as an agent to sell the bonds, by the plaintiffs, who agreed to pay him a commission of \$2,500. Whatever the intention of the defendant was when he wrote the letter of the 26th May, I am satisfied by his subsequent dealings, and from the evidence, and I find as a fact, that, having found, through Daude, a purchaser, he decided to purchase the bonds himself, as he states in his telegram of the

3rd June. This, I think, is made clear beyond all doubt by the fact that neither his associate's name nor that of the purchaser were disclosed to the plaintiffs; and, although Daude was examined at length in New York, it does not yet appear what the Bloomingdale estate was to pay for the bonds. I entertain no doubt that the defendant and Daude, having effected, as they thought, a sale, on terms satisfactory to themselves, to the Bloomingdale estate, purposely withheld the terms of the transaction; the defendant treating the transaction, as in fact it was, as a sale to himself, and that he acted not as agent, but as principal, in the transaction.

There is a further defence under the Statute of Frauds, now R.S.O. 1914, ch. 102. I think it clear that the bonds in question, read in connection with the trust indenture, which gives the power, upon default, of sale of the mortgaged property, are within the statute. See *Driver v. Broad*, [1893] 1 Q.B. 539, affirmed *ib.* 744. Aside from the statute, there is no question that a sale to the defendant was concluded; and I am further of opinion that what took place meets the requirements of the statute. The correspondence referred to clearly discloses the vendors and the terms of sale and the fact that the defendant had purchased the bonds.

I think the correspondence between the defendant and Daude is admissible as evidence of the bargain. See *Gibson v. Holland* (1865), L.R. 1 C.P. 1. This case arose under the 17th section of the Statute of Frauds, but reference is made by Erle, C.J., to a number of cases in support of this decision, which were decided under the 4th section of the Statute of Frauds.

In Sugden's Law of Vendors and Purchasers, 14th ed., it is said (p. 139): "A note or letter, written by the vendor to any third person, containing directions to carry the agreement into execution, will, subject to the before-mentioned rules, be a sufficient agreement to take a case out of the statute;" citing *Welford v. Beazely* (1747), 3 Atk. 503; *Seagood v. Meale* (1721), Prec. Ch. 560; and a number of other cases, including *Leroux v. Brown* (1852), 12 C.B. 801; and the same doctrine is said to apply to a letter written by a purchaser: *Rose v. Cunynghame* (1805), 11 Ves. 550. Willes, J., in the *Gibson* case points out

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the distinction between the wording used in the 4th section and the 17th section, and, referring to *Bailey v. Sweeting* (1861), 9 C.B.N.S. 843, says: "As the letter contained evidence of the terms upon which he had once contracted to be bound, it was properly held to be a sufficient memorandum to satisfy the statute." That case was under the 17th section. He then proceeds: "I have, on former occasions, expressed the inability I felt to understand the case of *Leroux v. Brown*, though of course we are bound by it. It affords, however, a remarkable confirmation of the correctness of the construction we now put upon the statute . . . ."

I have not been able to find, nor has counsel cited, any case where the law has been held to be otherwise than as indicated by Erle, C.J., in the *Gibson* case. See also Agnew's Statute of Frauds, p. 244, and cases there cited.

I therefore hold that the correspondence between the defendant and Daude, above referred to, is admissible, and thus a sufficient memorandum in writing to satisfy the statute has been made out.

I also find that the defendant approved and affirmed the sale of \$15,000 and \$2,000 of the bonds which were sold by the plaintiffs and credited upon the defendant's account.

Owing to the general stringency, aggravated, no doubt, by the declaration of war, it was difficult to find a purchaser for the bonds. The plaintiffs, after due notice, duly advertised for tenders. The only tender received was from the Canada Trust Company at 92 and interest. The plaintiffs had purchased the bonds from the Canada Trust Company, who, at the time of the sale to the defendant, held the bonds as security for an advance made by them to the plaintiffs. I find that the plaintiffs endeavoured to induce the Canada Trust Company to put in a tender at 95; this they refused to do, but offered to put in a tender at 92. The price at that rate was less than the plaintiffs' loan. This difference was paid by the plaintiffs to the Canada Trust Company partly in cash and partly secured by collaterals. There was a secret understanding between the plaintiffs and the Canada Trust Company that the plaintiffs, if they succeeded in recovering from the defendant, should hand over to the trust

company the proceeds of such action up to \$6,201. If the plaintiffs did not recover anything from the defendant, the trust company would credit the plaintiffs for the bonds at 95, making a difference of three points. To Mr. Hellmuth, on cross-examination, Mr. McKinnon stated that, whether they recovered in this action or not, the plaintiffs cannot lose more than \$11,000. He followed this statement with the explanation that they have actually lost in fact nearly \$17,000. It was urged on behalf of the defence that in no event can the plaintiffs recover more than \$11,000. I am satisfied that the plaintiffs obtained the best price possible for the bonds, having regard to the condition of the market, and that what was done by the plaintiffs in their negotiations with the Canada Trust Company was not with a view to injure the defendant or obtain any undue advantage over him, but to realise the best price possible. The Canada Trust Company and the plaintiffs had large dealings between them, and, as explained by the manager of the trust company, the arrangement made in case the plaintiffs failed in recovering anything from the defendant was out of consideration, under all the circumstances, which they felt for the plaintiffs. The loss to the plaintiffs is in fact about \$17,000. Out of this sum they have to pay \$6,201 to the trust company. They are still losers of about \$11,000.

After the best consideration that I can give the matter, I think the plaintiffs are entitled to recover the amount of their actual loss: see *In re Vic Mill Limited*, [1913] 1 Ch. 183. Anything less than the \$16,911.77 would not be sufficient to recoup them.

The plaintiffs are, therefore, entitled to judgment for \$16,911.77, with interest from the 3rd December, 1914, and costs of the action.

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## BELL V. TOWN OF BURLINGTON.

*Municipal Corporations — Annexation of Part of Township to Village — Order of Ontario Railway and Municipal Board — Postponement of Time for Taking Effect—Erection of Village, including Annexed Territory, into Town — Jurisdiction of Board — Misrecital of Statute — Assessment of Residents of Annexed Territory by Town Council without Representation—Supplementary Assessment—By-laws—Bona Fides —De Facto Council—Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, secs. 39 (1), 47, 48—Municipal Act, R.S.O. 1914, ch. 192, secs. 17, 20, 230—Liability for Taxes—Laches.*

On the 10th June, 1914, on the application of the council of the village of B., an order was made by the Ontario Railway and Municipal Board directing that from and after the 31st December, 1914, a defined strip of land adjoining the village of B. should be detached from the town of N. and annexed to the village of B.:—

*Held*, that the Board had power under the Municipal Act to make such a change in boundaries, and had power under sec. 39 (1) of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, to make the order suspensive in its operation.

*Held*, also, that there was no ground for the allegation of the plaintiff that the application of the village council for an increased acreage was not made in good faith on account of "the proximity of the streets or buildings in the district or the probable future exigencies of the village:" sec. 17 of the Municipal Act, R.S.O. 1914, ch. 192.

*Held*, also, that a misrecital in the order of the language of sec. 17—the words recited not being those in the statute nor their equivalent—did not vitiate the order: the recital was not a necessary part of the order, and could not be so read as to indicate that the Board disregarded the statutory directions; and every assumption should be made in favour of the validity of the order—the more so as the Legislature had provided means of relief: secs. 47 and 48 of the Ontario Railway and Municipal Board Act.

On the 9th December, 1914, a second order was made by the Board, upon the application of the village council—the village having a population of not less than 2,000, as required by sub-sec. 1 of sec. 20 of the Municipal Act—erecting the village into a town, declaring that the existing limits of B., *including the territory annexed thereto by the Board on the 10th June, 1914*, should be the boundaries of the town of B., and dividing the town into wards (sub-sec. 3). The wards designated by the Board, however, did not contain or include any part of the annexed territory. It was contended by the plaintiff that the town council elected in January, 1915, on this subdivision into wards, had no power to represent, or to levy taxes on, the annexed territory:—

*Held*, that, as regarded the erection of the village into a town and the annexation to it of this adjacent land, the matter as to all lack of form or of notice (if any) was for all purposes concluded by sub-sec. 7 of sec. 20, making the order of the Board conclusive evidence of the due erection of the town in accordance with the Act.

The assessment roll of 1914 for the collection of taxes in 1915 was completed during 1914 without reference to the new territory, which in fact did not become annexed until the end of 1914. The town council, under sec. 230 of the Act, by a by-law passed on the 22nd March, 1915, appointed an assessor who assessed the property of the residents in the new territory; and by a second by-law passed on the 22nd June, 1915, ratified the assessment made; and the council imposed taxes, according to this assessment, one-half payable before the 15th July, 1915—the plaintiff being one of the persons taxed. The matters of which the plaintiff complained began in June, 1914, and he took no action until the 29th July, 1915:—

*Held*, that the plaintiff by his inaction had allowed liabilities to be incurred and expenditures to be made which ought not lightly to be interfered with; no substantial injustice had been done to the plaintiff; and there was no satisfactory ground for setting aside the *bonâ fide* action of the *de facto* council in regard to the taxes.

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ACTION for a declaration that a certain parcel of land owned by the plaintiff was not within the limits of the town of Burlington, and was not liable to assessment as land lying within the town; that certain by-laws passed by the town council and orders made by the Ontario Railway and Municipal Board were illegal and void and should be set aside; to restrain the defendants, the town corporation, from proceeding to collect taxes from the plaintiff in respect of his land; and for other relief.

The action was tried by BOYD, C., without a jury, at Milton.  
*W. Laidlaw*, K.C., for the plaintiff.  
*W. Morison*, for the defendants.

October 1. BOYD, C.:—The plaintiff seeks to nullify the action of the Ontario Railway and Municipal Board in annexing a part of the township of Nelson to the village of Burlington, and the further action of erecting the village so enlarged into the town of Burlington, and to enjoin the levy of taxes by the defendants upon land owned by him in the annexed district.

The first attack is on the order of the Board made on the 10th June, 1914, by which a defined strip of land adjoining the village was detached from the township of Nelson and annexed to the then village of Burlington. At the request of the inhabitants of the district attached, the Board directed that the annexation should not take place forthwith, but that from and after the 31st December, 1914, the part of the township described should be incorporated in and with the municipality of Burlington. The Board had the power to make in form such an order, suspensive in its operation: Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 39 (1); and the Board had jurisdiction to make such a change in boundaries under the Municipal Act. The point is taken in the pleadings, but not substantiated in the evidence, that the application by the municipal council was not *bonâ fide* for an increased acreage on

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account of the proximity of streets or buildings in the district annexed or because of future exigencies of the village; but for the purpose of increasing the population so as to procure the number required in order to erect the village into a town. This is disproved. The population of the village before the application to annex was 300 more than 2,000.

The plaintiff also relies on the terms of the order made, in the first recital of which it is stated that the Municipal Act enacts that the Municipal Board may, upon the application of a village, annex thereto lands "which may seem proper and necessary for the carrying on of the administration of the said village." No such language can be found in the Municipal Act; the only section which confers jurisdiction is sec. 17 (R.S.O. 1914, ch. 192), which reads: "The Municipal Board may, upon the application of the council of a village, annex a district to it where from the proximity of the streets or buildings in the district or the probable future exigencies of the village, the Board deems it expedient." The scope of this section goes back to early days. By C.S.U.C. 1859, ch. 54, sec. 13, the power was to be exercised, on petition of a village, by the Governor, who might by proclamation add to the village "any part of the localities adjacent, which, from the proximity of streets or buildings therein, or the possible future exigencies of the village, it may seem desirable to add thereto." This phraseology has passed into current statutory language, and has been continued ever since through all revisions till the present time. See R.S.O. 1877, ch. 174, sec. 14; R.S.O. 1887, ch. 184, sec. 14; R.S.O. 1897, ch. 223, sec. 16. So and in like terms the law continued till 1913, when the executive power was transferred from the Lieutenant-Governor to the Ontario Railway and Municipal Board, when the enactment now in force appears which has been carried into the last revision: R.S.O. 1914, ch. 192, sec. 17.

The Board has, for some unexplained reason, seen fit to change the language of the section while professing to proceed by virtue of it. I cannot say that the meaning of the new words used is equivalent to the meaning of the statute, though the

Board may have thought so: what I have to deal with is, whether the error of the recital should vitiate the action of the Board—assuming for the present that the Court has jurisdiction in the premises.

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I have evidence *aliunde* of the proximity of parts of two streets. New street and Brant street, forming part of the strip annexed, were before annexation boundaries between Nelson and the village, and the effect of the annexation is to incorporate them into the village. Upon these parts of the streets public money of the village has been time and again expended in their repair and maintenance. That fact, which was known to the Board, demonstrates the expedience of the annexation. Granted that the order misrecites the statute, it does not follow that the act of annexation was beyond the jurisdiction of the Board. I think that the whole recital is inofficious and superfluous, and cannot be so read as to indicate that the Board disregarded the statutory directions. If the Board had simply made an order declaring and ordering the annexation of the district in question without more, that order would not have been impeachable because it was not more explicit: R.S.O. 1914, ch. 186, sec. 44.

The effect of a misrecital in a deed is discussed by Holt, L.C.J., in *Bath and Mountague's Case* (1693), 3 Ch. Ca. 96, and to be found in the English Reports, vol. 22, at pp. 991, 992: he points out that the recital [of a deed] is not at all a necessary part of the instrument; and that, if the immaterial recital appears to be repugnant to what is the material part of the instrument, it will not destroy the effect of the instrument, but may be regarded as the mistakes of the clerk. His whole discourse on the point of the benignant interpretation of charters appears to me well applicable to sustain the validity of the material part of the Board's order.

An erroneous recital in the preamble of an Act of Parliament was treated as ineffective by the Supreme Court of Canada in *Dwyer v. Town of Port Arthur* (1893), 22 S.C.R. 241.

Having regard to the statutory safeguards which are thrown around the acts of the Board and to the fact that the Board exercises the administrative authority formerly delegated to the Lieutenant-Governor, every assumption should be made in



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favour of the validity of such orders—particularly when the Legislature has provided an easy means of relief by summary application to the Lieutenant-Governor: R.S.O. 1914, ch. 186, sec. 47; and also on questions of jurisdiction or of law by direct appeal to a Divisional appellate Court: *ib.*, sec. 48.

But now to pass on to the second order made by the Board—made on the 9th December, 1914. This was made on the application of the village, having, as stated, a population of 2,364, to be erected into a town, and it was granted by the Board. The statute, R.S.O. 1914, ch. 192, sec. 20, gives power to the Board to erect a village of not less than 2,000 into a town and declare the name which it is to bear: sub-sec. 1. By sub-sec. 2 it is enacted: "Where, from the proximity of streets or buildings or the probable future exigencies of the newly erected . . . town, the Board deems it desirable that part of one or more adjacent townships should be included in it, the Board may . . . detach such part from the township . . . and annex it to the newly erected . . . town." Having regard to this and in affirmation of what had been already done in the way of annexation, the Board not only orders that the village of Burlington as at present constituted be erected into a town, but goes on to order and declare that the existing limits of Burlington, *including the territory annexed thereto by the Board on the 10th June, 1914*, shall be the boundaries of the town of Burlington.

The statute provides (sub-sec. 3) that the newly erected town shall be divided into wards as the Board may direct. It is said that the three wards which were designated by the Board in that order did not contain or include any part of the annexed territory. That perhaps is important only in view of the further contention that the council elected by the town, on this subdivision of the wards, had no power to represent, or to levy taxes on, the newly annexed territory; and this is the gravamen of the plaintiff's complaint. It may be that the Board, while recognising that the annexed territory was to be included in the boundaries of the town, may have been influenced in their allocation of the wards by the fact that such inclusion did not come into effect till after the expiry of the municipal year 1914. The

nomination of the council would occur before that time, and the actual election of the council for the year 1915 would be consummated, according to the Municipal Act, on the 1st January, 1915, contemporaneously with the actual incorporation and annexation of the new territory. However that may be, I take it that, so far as regards the erection of the village into a town and the annexation to it of this adjacent land, the matter as to all lack of form or of notice (if any) is for all purposes concluded by the emphatic words of the Act, ch. 192, sec. 20, subsec. 7: "The order shall be conclusive evidence that all conditions precedent to the making of it have been complied with, and that the . . . town has been duly erected in accordance with the provisions of this Act."

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A fresh starting-point is thus obtained to deal with the assessment made upon this new territory.

True it is, as stated in the complaint, that the assessment roll of 1914 for the collection of taxes in 1915 was completed during the year 1914 without reference to the land in Nelson (which was to be annexed in 1915). Nothing else could be done in the circumstances: the plaintiff remained liable to pay his taxes in Nelson for that year; but the land was removed from Nelson at the end of 1914, and he, as a resident of the newly erected town, became liable to pay taxes in that locality thenceforward. The only trouble was as to the machinery by which they should be ascertained.

The plaintiff's contention is, that this new territory was not represented in the council of 1915, and that it was illegal to impose taxes in the absence of a properly constituted council. It may be said that the clerk of the municipality of Burlington should have made up a supplementary list of voters containing the names of those entitled to vote in the detached territory, under sec. 93 of ch. 192; and, though this omission might have invalidated the election if proper objection had been made, yet it ought not to affect the *bonâ fide* conduct of the council as *de facto* elected to carry on municipal affairs such as the imposition and collection of taxes.

The defendants felt the difficulty of the situation, and applied for advice to the Board, and received a letter giving the

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opinion of the Board that the proper course would be to make a supplementary assessment of the newly annexed territory after the 1st January, since up to that time the annexed district had not become part of Burlington.

Acting on this suggestion, and under sec. 230 of the Act, the council, by by-law No. 283, passed on the 22nd March, 1915, appointed an assessor who assessed the property of the residents in the new territory—the plaintiff, among others, for the sum of \$63.70, one-half payable before the 15th July, 1915. The by-law did not on its face specifically define the locality to be assessed, but the work was done exclusively on the new and non-assessed territory annexed. The council thereupon passed another by-law, No. 291, of the 22nd June, 1915, to ratify the assessment of the newly annexed territory. From this assessment the plaintiff appealed to the Local Judge in July, 1915, and the assessment was affirmed.

It was stated and not denied that the plaintiff and other dissidents were willing that a portion of the strip, half the depth determined by the Board, should be annexed, but were unwilling that the full depth, which took in the houses on the strip, should be included. While the matters complained of began in June, 1914, the plaintiff took no action to invalidate them till the 29th July, 1915, and by his inaction has allowed liabilities to be incurred and expenditures to be made by the town which ought not lightly to be interfered with. No substantial injustice—if any—has been done to the plaintiff; and I find no satisfactory ground for setting aside the *bonâ fide* action of the *de facto* council in regard to the taxes complained of: *County of Pontiac v. Ross* (1890), 17 S.C.R. 406, 413; *Gill v. Jackson* (1856), 14 U.C.R. 119, 127.

The action will stand dismissed with costs.

[BRITTON, J.]

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## GARMENT V. CHARLES AUSTIN CO. LIMITED.

Oct. 1.

*Master and Servant—Injury to Servant—Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.)—Remedy—Application to Workmen's Compensation Board—Action—Jurisdiction of Supreme Court of Ontario—Sec. 15, Amended by sec. 8 of 5 Geo. V. ch. 24—Contributory Negligence—Secs. 107, 108—Jury—Judge's Charge.*

The plaintiff, who was injured upon the business premises of his employer, on the 23rd January, 1915, which was after the coming into force of the Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.), brought an action against his employer to recover damages for his injuries; and it was held, that he had a right of action, his remedy not being confined to an application to the Workmen's Compensation Board, under the Act.

Section 15 of the Act, as amended by sec. 8 of 5 Geo. V. ch. 24, does not take away from the Supreme Court the power to determine the question of the plaintiff's right to compensation under Part I. of the Act.

Sections 69, 105, 106, 107, 108, 109, and class 36 of schedule 1 of the Act, considered.

Under sec. 107, contributory negligence on the part of a workman is not a bar to recovery; but (sec. 108) contributory negligence is to be taken into account in assessing the damages.

The question of contributory negligence was submitted to the jury, and they found contributory negligence; it should be assumed that they took that into account in assessing the damages, as they were told to do by the trial Judge in his charge.

Upon the findings of the jury, judgment was given for the plaintiff.

**ACTION** by a man employed by the defendant company to recover damages for personal injuries sustained upon the defendant company's premises, by reason of the negligence of the defendant company, as the plaintiff alleged.

The action was tried before BRITTON, J., and a jury, at Chatham.

*R. L. Brackin and B. L. Bedford*, for the plaintiff.

*O. L. Lewis, K.C., and Ward Stanworth*, for the defendant company.

October 1. BRITTON, J.:—The plaintiff was in the employ of the defendant company at Chatham. That company carried on a retail dry goods and furniture business. In the shop was an elevator, duly installed, and used for carrying goods from one storey to another in the building. The person in charge of goods from time to time went up and down upon the hoist or elevator car. There was an entrance to the car or hoist from the street-level outside and from the ground-floor on the inside of the building.

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On the 23rd January, 1915, the plaintiff, who was then and had been for some months before in the employment of the defendant company, had occasion to use the elevator or hoist to take up furniture which the plaintiff had brought to the defendant company's shop. It was a lawful and proper use of the elevator by the plaintiff. The elevator was so arranged and equipped that, upon the hoist or car going up, it unloosed a gate which dropped to the opening below and served as a gate or fence or barrier to prevent any person stepping into the shaft and falling to the bottom.

At the time mentioned, viz., about 10.30 a.m. of the 23rd January, 1915, the plaintiff, finding the lower door shut and fastened, went inside the shop and to the door of the elevator, and, finding no gate or barrier there, stepped inside, thinking the car was there—as he had a right to think—because the gate or barrier was not in its place. The car was not there, and the plaintiff fell to the bottom of the shaft, breaking his right leg above the knee and injuring his right knee.

The barrier or gate was not in place because it was out of repair, in this respect, that the catch which held the gate at the upper flat was so out of repair that the car in going up did not loosen it, and allow it to go to its proper place and prevent persons from going in at the lower opening. Lowering of the gate was done automatically by the ascending car when the apparatus was in its normal condition.

The plaintiff brings the present action to recover damages from his employer. The defendant company contends that the Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.), applies, and that the plaintiff has no right of action. If he has any remedy, it must be sought by proceedings before the Board. The defendant company did not raise the question of jurisdiction in its first statement of defence, but applied at the trial to add the following as paragraph 4: "The defendant, by way of further answer to the plaintiff's claim herein, sets up and avails itself of sections 5, 15 (as amended by section 8 of 5 Geo. V. ch. 24), 69, 105, and class 36 of schedule 1 of the Workmen's Compensation Act, as a defence to and in bar of the plaintiff's claim herein and right to institute and bring this action in respect thereof." This amendment was allowed.

The defendant company, at the time of the accident, was not doing business as an industry for the time being included in schedule 1 of the Act; so this section has no application to bar the plaintiff.

Section 15, as amended, gives the right to a party to an action to apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under Part I. of the Act. If the plaintiff in an action does apply, the adjudication and determination is final.

That does not take away from the Supreme Court the power to determine that question. In this case there was an application to the Board. There was not what can be called a formal adjudication and determination by the Board; but, in so far as it went, the action of the Board was in accord with the view I take of the Act. There was certainly no decision against the plaintiff's right to recover.

Section 69 does not throw light upon the point in question, as it deals only with providing an accident fund out of which compensation is to be paid; and in this case compensation cannot be ordered out of that fund.

Section 109 is: "This Act shall not apply to farm labourers or domestic or menial servants or their employers."

Section 105 is subject to the exceptions in sec. 109, and its object is to provide that persons like the plaintiff, who are excluded from the benefit of the provisions of Part I., shall not by that section be excluded from the benefit of secs. 106 to 108.

Section 106 creates a liability of the employer for defective ways and works and for the negligence of his servants.

Section 107 abrogates certain common law rules, and enacts that contributory negligence on the part of a workman shall not be a bar to recovery.

Section 108 enacts that contributory negligence shall nevertheless be taken into account in assessing the damages in any such action.

In the result, it seems to me clear that such an action as the present is not such an one as requires the workman who was injured to go before the Board.

The questions submitted by me to the jury with the answers are as follows:—

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(1) Were the defendants guilty of any negligence which occasioned the accident to the plaintiff? A. Yes.

(2) If so, what was that negligence? A. By defective gates and insufficient light.

(3) Was the elevator shaft reasonably protected so as to prevent accident to persons lawfully entitled to use the elevator or hoist? A. No.

(4) If not, in what respect was it insufficient or defective? A. By faulty gate and no light.

(5) Did the accident to the plaintiff happen by reason of such defect? A. Yes.

(6) Did the defendants know before the accident to the plaintiff of such defect or insufficient protection, in case you find defect or insufficiency? A. Yes.

(7) Were the defendants guilty of negligence in not remedying such defects as you find? A. Yes.

(8) Was the accident occasioned by reason of such negligence? A. Yes.

(9) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes.

(10) Damages. If the plaintiff is entitled to recover, how much over and above the amount paid by defendants to the plaintiff and for him? A. Five hundred dollars.

It will be seen that the jury had the question as to contributory negligence submitted to them, and that they answered it. No doubt, they did as I told them in my charge they should do—take that into account in assessing the damages. Apparently the defendant company paid the doctor's bill \$50, hospital charges \$48, and about \$220 as a weekly wage or allowance for 22 weeks at \$10 a week.

The plaintiff claimed only \$500 over and above the other sums.

Upon the answers and upon the whole case, there will be judgment for the plaintiff for \$500, with costs on the Supreme Court scale. There will be nothing of any of above sums set off against the \$500, and no set-off of costs.

## [APPELLATE DIVISION.]

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Oct. 4.

## RE ARTHUR AND TOWN OF MEAFORD.

*Municipal Corporations—Local Option By-law—Motion to Quash—Discretion.*

A Divisional Court of the Appellate Division, upon the motion to quash a local option by-law referred to it by MIDDLETON, J. (*ante* 231), was of the opinion that, in the admitted circumstances of the case, its discretion should not be exercised in favour of the motion; and, without expressing any opinion as to the validity or otherwise of the by-law, dismissed the motion with costs.

APPLICATION by William Henry Arthur and William Hunter Kennedy, by notice of motion served on the 13th February, 1915, for an order quashing a local option by-law passed by the Council of the Town of Meaford on the 16th February, 1914.

The application came before MIDDLETON, J., in the Weekly Court at Toronto, and he referred it to a Divisional Court of the Appellate Division, under sec. 32 of the Judicature Act, R.S.O. 1914, ch. 56: see *Re Arthur and Town of Meaford*, *ante* 231.

In order to understand the objections to the by-law, reference should be made to the report of the case of *Hair v. Town of Meaford* (1914), 31 O.L.R. 124.

The affidavit of Frank Kent, of Meaford, filed on behalf of the respondents, in answer to the application, contains a summary of the facts. It is as follows:—

1. I am the Mayor of the Town of Meaford for the year 1915. I was also Mayor for the years 1914 and 1913.

2. On the 6th day of January, 1913, a local option by-law was submitted to the electors of the said town. Subsequently a scrutiny of the ballots cast on the said by-law was held by the County Court Judge, and thereafter he certified that there were 444 votes cast for the by-law and 297 votes cast against it, and that the by-law had been defeated.

3. After the taking of the vote on the said by-law, supporters thereof put forward the contention that the proceedings in connection with the taking of the said vote were illegal and void on several grounds. Among these grounds were the following:—



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(a) That a number of residents of the township of St. Vincent, whose names were upon the voters' list for the town of Meaford, but who were not entitled to vote on the said by-law by reason of their lack of residential qualification, voted on the said by-law, the number of such illegal votes being greater than the majority by which the by-law was defeated.

(b) That, owing in part to the fact that there were only three polling places provided for the six polling subdivisions in the town, there was much haste and confusion and non-observance of the provisions of the Act with respect to the taking of the said vote, and that the provisions of the law with reference to voting compartments and the secrecy of the ballot were not observed, and that the vote of the electors was not taken according to the principles of the Act.

4. An action was thereafter commenced by one Overholt, an elector of the town of Meaford, claiming a judgment of the Court that the proceedings in connection with the submission of the said by-law were null and void and did not operate to prevent the submission to the electors of another by-law of the like nature at the date of the municipal elections for 1914. In and by his proceedings in that action, the plaintiff Overholt set out the particulars of the matters of irregularity above referred to and other grounds upon which he contended that the said proceedings were null and void.

5. In view of the matters alleged in the said proceedings, a deputation of the electors of Meaford waited upon the Provincial Secretary for the Province of Ontario at Toronto in or about the month of March, 1913, and requested that he should use his authority under the statute to prevent the issue of licenses in the town of Meaford, and it was subsequently publicly announced that the licenses of the Meaford hotelkeepers would not be issued, but that they would be given permits for three months.

6. In the meantime, as Mayor of the town, I had consulted Mr. Albery, the town solicitor, as to the position of the town with respect to the said Overholt action. The town solicitor, Mr. Albery, was also the town clerk, and was in that capacity personally familiar with many of the matters alleged in the said

Overholt action, and I was advised by Mr. Alberty that, in his opinion, having regard to the general law and in particular to the judgment of the Court which had been pronounced in the *Owen Sound* case a few months before this time, the action could not be successfully defended.

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7. In the month of July, 1913, the question of the issuance of the said licenses on the expiry of the permits on the 1st August was raised, and it then appeared that there had been a misunderstanding between the License Branch of the Department of the Provincial Secretary and the deputation which had visited the Department to request that licenses be not granted, the deputation taking the position that they had understood that the licenses were not to issue for three years from January, 1913, and the Department taking the position that the intention was merely to suspend the issue of the licenses pending the decision of the Overholt action. Under these circumstances, it was suggested by the Department that permits should issue for the balance of the year 1913, both sides to agree that a new by-law should be submitted in January, 1914, and that if that by-law were carried the licenses should at once be cut off, otherwise the licenses to continue. In the discussions which followed, as I am informed and believe, Mr. James Haverson, K.C., represented the opponents of the by-law, including the three license-holders in Meaford, and the solicitors for Mr. Overholt represented the committee having charge of the proceedings in the Overholt action. The agreement arrived at was embodied in a memorandum which, as I am informed and believe, was handed by Mr. Saunders, of the License Department, to the Toronto newspapers for publication, and the said memorandum was published in both the Toronto and Meaford papers. The said memorandum is marked exhibit 10 in the Hair action hereinafter mentioned.

8. It was then represented to me as Mayor and to the Council of Meaford that the arrangement above outlined had been made subject to the approval by the town council and subject to the consent of the town council to submit the by-law again. The municipal council thereupon instructed its solicitor to admit

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the allegations of facts in the Overholt action, which he had ascertained to be well-founded, and to consent to judgment as asked by the plaintiff, and this was done.

9. The applicant Kennedy was one of the holders of a hotel license in the town of Meaford for the license year 1912-13, and one of those to whom permits were granted after the 1st May, 1913, and I am advised and believe that, in the arrangement made by Mr. Haverson with the License Department and the solicitors for the plaintiff in the Overholt action, he acted under instructions from the applicant Kennedy and the other license-holders in Meaford, and that afterwards, when he appeared in Court on the motion for judgment in the Overholt action, he represented the Ontario License Holders Association, of which the applicant Kennedy was a member. The action of the License Department in the said matter and the arrangement arrived at were announced in the Toronto newspapers and copied in the Meaford papers, and became a subject of general knowledge and discussion in the town of Meaford at the time, and no protest was received by the town council of Meaford against the re-submission of the local option by-law. Both sides began early in the autumn of 1913 for the contest in January, 1914, and the three license-holders, including the applicant Kennedy, wrote a letter to the council requesting the council to be careful that the irregularities which had characterised the submission of the by-law in 1913 were not repeated in the submission of the by-law in 1914. The said letter is marked exhibit 18 in the said Hair action hereinafter mentioned.

10. Pursuant to the agreement embodied in the said memorandum, permits were granted to the Meaford license-holders, including the applicant Kennedy, until the date of the municipal election for 1914.

11. The by-law was duly submitted to the electors in January, 1914, and was declared by the returning officer to have been carried, and the liquor licenses, including that of the applicant Kennedy, were thereupon cut off, pursuant to the arrangement that had been made with the License Department in July, 1913.

12. Thereafter, and before the by-law had received its third reading, a man named Hair, a resident of Meaford, brought an action to restrain the town council from giving the by-law its third reading, on grounds similar to the grounds that are alleged in the present proceedings. It developed during the course of the said action that the said Hair was acting in concert with the present applicant Kennedy and at his instance. The Hair action was tried and dismissed, and the by-law was then given its third reading and finally passed, and has since then been in full force and effect.

13. Thereafter the applicant Kennedy rented his premises in Meaford, and removed to the town of Barrie, where, as I am informed and believe, he is now conducting a liquor store.

14. Since the municipal election of 1913, and in consequence of complaints then made with respect to the insufficient number of polling places and insufficient provisions for secrecy of the voting, the municipal council has established for the elections held in 1914 and this year, one polling place for each polling subdivision, that is to say, six polling places for the town, instead of three.

15. Throughout, the town council of Meaford has acted in good faith and with an honest desire to carry out the will of the electorate.

The grounds of the motion were as follows:—

1. The by-law contravened sub-sec. 5 of sec. 141 of the Liquor License Act then in force: sec. 6 Edw. VII. ch. 47, sec. 24: because passed within three years from the time that a similar by-law had been submitted and rejected.

2. The vote taken on the by-law was not founded on any list prepared and posted up in accordance with the provisions of the Municipal Act, 1913, sec. 266, nor was there any such list, nor was the same revised by the County Court Judge.

3. The day appointed for persons to attend at the polling places and at the final summing up of the votes by the clerk was not published as required by sub-sec. 6 of sec. 263 of the Municipal Act, 1913.

4. The day and places appointed for taking the votes were

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not published as required by sub-sec. 6 of sec. 263 of the Municipal Act, 1913.

5. By-law No. 40 of 1913, passed on the 17th November, 1913, did not state the day appointed for the taking of votes.

6. By-law No. 40 did not appoint the time and place for the clerk to sum up the number of votes given for or against the proposed by-law.

7. The by-law in question was not duly approved of by the electors of the town of Meaford in the manner provided by the Municipal Act, 1913, for the reasons aforesaid.

October 4, The motion came before a Divisional Court of the Appellate Division composed of FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. E. Raney, K.C., for the town corporation, the respondents, took the preliminary objection that the motion was not made within the time limited by the Municipal Act. Under sec. 286 of the Act, R.S.O. 1914, ch. 192, the application must be made within one year after the passing of the by-law. The notice of motion must be validly and regularly served within that time: *Re Shaw and City of St. Thomas* (1899), 18 P.R. 454, at p. 457, following *Re Sweetman and Township of Gosfield* (1889), 13 P.R. 293; *Re Fox and Town of Owen Sound* (1904), 3 O.W.R. 654. A further objection was that the applicant had allowed an unreasonable time to elapse before making his motion: *Re Kelly and Town of Toronto Junction* (1904), 8 O.L.R. 162; *In re McAlpine and Township of Euphemia* (1880), 45 U.C.R. 199. There is no explanation of the delay from the 16th February, 1914, when the by-law was passed, to the 13th February, 1915, when the notice of motion was served: see *Hair v. Town of Meaford*, 31 O.L.R. 124. The motion is without merit, and is in breach of the agreement pursuant to which the by-law was submitted to the electors.

W. A. J. Bell, K.C., for the applicants, admitted that there was no explanation of the delay, and that the applicant Kennedy had had the benefit of the agreement; but contended that the council had no power to pass the by-law, for the reasons stated

as grounds for the appeal; referring to *Hair v. Town of Meaford*, *supra*, and cases there cited.

*Raney* was not called on to reply.

The judgment of the Court was then delivered by FALCONBRIDGE, C.J.K.B.:—We are of opinion that, in the admitted circumstances of the case, our discretion should not be exercised in favour of the motion.

We do not express any opinion as to the validity of the by-law or otherwise.

I suppose we shall have to impose costs.

*Application dismissed with costs.*

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[APPELLATE DIVISION.]

RE STANDARD LIFE ASSURANCE CO. AND KEEFER.

*Life Insurance—Policies Declared to be for Benefit of Wife and Children—Rights of Children of Deceased Children—Retrospective Legislation—Insurance Act, R.S.O. 1914, ch. 183, secs. 170, 171 (9), 178 (1), (7).*

The decision of MIDDLETON, J., *ante* 235, was affirmed.

APPEAL by Charles H. Keefer from the order of MIDDLETON, J., *ante* 235.

October 4. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

*H. M. Mowat*, K.C., for the appellant. The introduction into the Ontario Insurance Act, 1912, sec. 178 (7), of words which defeat survivorship in preferred beneficiaries applies to “designated preferred beneficiaries,” not as here to “preferred beneficiaries,” namely, the wife and children, who were the only beneficiaries mentioned in the original Act, 29 Vict. ch. 17, under which Mr. T. C. Keefer’s declaration was made. In any event, when the Act of 1912 was passed, Charles H. Keefer had acquired a sole interest in the policy, and the statute cannot be read so as to have the effect of divesting two-thirds of his interest from him, as the intent to do so is not clearly expressed.

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Section 170, which extends the Act to policies effected before its passing, should not be strained to operate against vested rights: *West v. Gwynne*, [1911] 2 Ch. 1. The provisions of 29 Vict. ch. 17, with subsequent amendments, are carried into sec. 171, and sub-sec. 9 provides that the survivor gets all the insurance. That sec. 171 was intended to cover not only friends and remoter relatives, but also near relatives and dependents, is evident, because sub-sec. 3 expressly prohibits the insured from altering or diverting the interest of a preferred beneficiary. The statute should not be read so as to force those included in the phrase "preferred beneficiaries" into being *cestuis que trust*, when there is no necessity for their protection from creditors. There is nothing in the Act forbidding children being made "ordinary" beneficiaries, and among ordinary beneficiaries the right of survivorship prevails as against the children of deceased beneficiaries (sec. 171 (9)). If the effect of the Act is to divest the interest of survivors, the rights of those who have been paying the premiums on their parents' policies are prejudicially affected by the judgment appealed from.

*F. W. Harcourt*, K.C., for the infant grandchildren, and *G. L. Smith*, for the adult grandchildren, were not called on.

The judgment of the Court was delivered by FALCONBRIDGE. C.J.K.B.:—For the reasons assigned in the judgment of Mr. Justice Middleton, which reasons have been amplified in the discussion before us, we consider that the order in appeal is right, and that the appeal should be dismissed.

In view of the fact that the learned Judge directed costs to be paid out of the insurance fund, the appellant might have rested content; and so, we think, he should pay the costs of this appeal.

*Appeal dismissed with costs.*

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GRANT'S SPRING BREWERY CO. LIMITED v. E. LEONARD & SONS  
LIMITED.E. LEONARD & SONS LIMITED v. GRANT'S SPRING BREWERY CO.  
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*Sale of Goods—Warranty—Defects—Bad Workmanship—Possible Cause of Defects—Evidence—Onus—Causal Connection—Repairs—New Evidence—Motion for Leave to Adduce.*

A manufacturing company warranted that only the best workmanship and material should be used in the construction of two boilers which they contracted to make and did make for and sold to a brewery company. After the boilers had been some time in use by the purchasers, leaks and cracks appeared in one of the boilers, and the purchasers sued for damages for breach of warranty, upon the ground that the leaks and cracks resulted from bad workmanship—the lap of one plate over the other was said to be too great, and the caulking was said to be too heavy:—

*Held*, that the onus was upon the purchasers to establish not only that the lap and the caulking were excessive, but that the excess in one respect or the other caused the leaks and cracks which rendered the boiler unfit for use; that this onus had not been discharged by the purchasers; and that the finding of the trial Judge that the workmanship was not as good as it might have been, and his statement that the things of which the purchasers complained *might have been* the cause of the leaks and cracks, were not sufficient, even in the absence of proof that they resulted from some other cause, to entitle the purchasers to recover damages—there must be evidence to connect the faults in workmanship with the defects which developed in the boiler; the bare possibility was not sufficient in the absence of the exclusion of all other reasonably possible causes.

*Badcock v. Freeman* (1894), 21 A.R. 633, and *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, explained and distinguished.

*Held*, also, that the brewery company had failed to establish a claim made by them for the price of repairs to the boilers.

After the actions were tried and judgment given by the trial Judge, and an appeal from his judgment heard but not disposed of, the purchasers made a motion to the appellate Court for leave to adduce evidence that a crack had recently been discovered in the second boiler:—

*Held*, that the evidence, if admitted, could not affect the result, as the crack was not shewn to have arisen from either of the defects on which the purchasers based their case; and the motion was refused.

Judgment of MEREDITH, C.J.C.P., affirmed.

APPEALS by both companies from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing both actions without costs.

The first action was brought to recover damages for a breach of warranty upon the sale of two boilers; the second action was brought to recover a sum for work done by the Leonard company, the manufacturers and vendors, in repairing one of the boilers.



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June 14. The appeals were heard by FALCONBRIDGE, C.J. K.B., MAGEE, J.A., and LATCHFORD and KELLY, JJ.

*G. Lynch-Staunton*, K.C., and *F. F. Treleaven*, for the brewery company, argued that there was an express warranty in the words, "only the best workmanship and material will be used in the construction of the boilers, and every precaution taken to ensure good results." There was also an implied term that the boilers should be reasonably fit for the purpose for which they were designed. The learned trial Judge found that the workmanship was not of the best, and that the defects in the boiler might have been caused by indifferent workmanship; the defects must be attributed to that cause; and the brewery company are entitled to damages: see *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72; *Badcock v. Freeman* (1894), 21 A.R. 633.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the Leonard company, contended, upon the evidence, that any defects in the boilers prior to the 20th April, 1914, were remedied under a new contract; that any since that time were due to the brewery company's negligence; and the Leonard company were entitled to payment for the repairs they had made.

*Lynch-Staunton*, in reply, referred briefly to the evidence.

October 4. LATCHFORD, J.:—The defendants (the Leonard company) warranted that "only the best workmanship and material" should be used in the construction of the boilers which they contracted to make and did make for the plaintiffs.

In the statement of claim it was alleged that the defects which manifested themselves in one of the boilers were due to both faulty workmanship and inferior material; but, before the trial, the plaintiffs (the brewery company) formally abandoned their contentions as to material.

Their claim for damages for breach of warranty thus fell to be determined upon the single ground that the leaks and cracks resulted from bad workmanship.

In two respects, and in only two, was the workmanship alleged to be bad. The lap of one plate over the other was said to be too great, and the caulking was said to be too heavy.

The onus was plainly upon the plaintiffs to establish not only

that the lap or the caulking was excessive, but that the excess in one respect or the other caused the leaks and cracks which rendered the boiler unfit for use.

The learned trial Judge found that the workmanship was not so good as it might have been. Had the rivetting been better, the caulking could not and would not have been so heavy. As to the overlap, the greater it is the greater the caulking needed; and the greater the caulking the worse the joint must be. "But," he observes, "perfection in construction is not bargained for in the purchase of a boiler of the character and the price of the one in question; good workmanship, good construction, is."

Then, after adverting to the strength of the evidence adduced on behalf of the defendants, he says he is not able to find in favour of the plaintiffs upon the question whether the things they complain of were really the cause of the cracks in the plates. "They may have been. If I were at liberty to guess, I cannot say how I should guess. I am not able to say, upon the whole evidence, that that has been proved."

What is regarded as not proved is precisely what it was incumbent upon the plaintiffs to prove, that the construction and workmanship such as they were caused the leaks and cracks.

There is also a finding that the overfiring, alleged by the defendants to be the cause of the cracks, was not proved.

The statement that the things of which the plaintiffs complain *may have been* the cause of the cracks in the plates is pressed now upon the Court as a finding which, in the circumstances, entitles the plaintiffs to damages. If, it is argued, workmanship, not so good as it might have been, may have caused the defects, then, in the absence of proof, as here, that they resulted from some other cause, the defects must be attributed to the possible cause, and the plaintiffs are entitled to recover damages.

In support of this contention *Badcock v. Freeman*, 21 A.R. 633, and *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, were cited.

In the former case, the question before the Court was, whether there was evidence for the plaintiff sufficient to have

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been submitted to the jury, or whether the Judge should, as a matter of law, have directed the dismissal of the claim. The plaintiff's husband had been killed by an explosion which had blown the cover off a tank. There was no direct evidence as to the cause of the explosion. Experts had, however, sworn that the fastenings of the cover were insufficient to hold the cover down when subjected to pressure from within. They stated their belief to be that the fastenings broke from insufficiency and deterioration from constant use. This evidence the Court considered not mere guess-work or conjecture, but matter which might properly be submitted to a jury.

In the *McArthur* case the judgment of the Supreme Court of Canada, *Dominion Cartridge Co. v. McArthur* (1901), 31 S.C.R. 392, was reversed. But the question in that case was not whether a possible cause of the accident had been proved. Taschereau, J., in his dissenting judgment, says (p. 402): "Now, the jury, seeing an explosion in a defective machine, and having before them evidence that it was utterly impossible otherwise to account for it, have drawn the inference of fact that the machine exploded because it was defective. There is nothing in the case to justify me in saying that the two Courts of the Province (eight Judges) were clearly wrong in holding that this conclusion was not an unreasonable one." In the Privy Council, Lord Macnaghten, after referring to the erratic manner in which the machine acted, causing at times the blow which ordinarily crimped the cartridge to fall on the metal end, in which the primer or percussion cap had been inserted, says ([1905] A.C. at p. 76): "It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator. The wonder really is, not that the explosion happened as and when it did, but that things went on so long without an explosion."

The effect of the decision is stated by Duff, J., to be that it is "sufficient to adduce evidence from which the tribunal may

fairly infer both the existence of the fault *and the connection between that fault and the injury complained of:*" *Shawinigan Carbide Co. v. Doucet* (1909), 42 S.C.R. 281, at p. 311.

There is lacking in the case at bar evidence of any connection between the faults found with the workmanship and the defects which developed in the boiler. The bare possibility referred to by the trial Judge is not sufficient in the absence of the exclusion of all other reasonably possible causes. One possible cause alleged by the defendants—overfiring—has been held not proved. That other such causes existed may reasonably be inferred from the fact that the first crack developed from a rivet to the end of the plate on the inner side of a lap, where caulking could not have caused the crack, and where defective material might have caused it, as indeed the plaintiffs alleged in their letter of the 15th February, 1914, and in their statement of claim.

No reasonably probable cause for the defects having been proved, the judgment in appeal is right in holding that the action of the brewery company should be dismissed.

The defendants in turn failed to establish their claim to be paid for the repairs made in 1914. They were not to receive payment unless the defects were due to excessive firing, and excessive firing was held not to have been proved.

I consider that the appeal and the cross-appeal should be dismissed. Both appeals failing, there should be no costs.

After the foregoing was written, on the 20th September, 1915, a motion was made by the plaintiffs for leave to adduce new evidence. From the material filed it appears that, subsequent to the delivery of the judgment in appeal and the argument before the Court, a crack extending from a rivet to the edge of a plate was discovered in the second boiler supplied by the defendants. It is not suggested that any other evidence of defects could be adduced.

Without passing upon the propriety of admitting at this stage the additional evidence, I am of opinion that, if admitted, it could not affect the result, as the crack was not shewn to have arisen from either of the only two defects on which the plaintiffs based their case—too much over-lap and excessive caulking.

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There is accordingly no ground for disturbing the conclusion arrived at previous to this application, the costs of which should be paid by the plaintiffs.

FALCONBRIDGE, C.J.K.B., and MAGEE, J.A., concurred.

KELLY, J., agreed in the result.

*Appeals dismissed without costs;  
motion dismissed with costs.*

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[APPELLATE DIVISION.]

McNULTY v. CLARK.

*Woodmen's Liens—Action to Enforce Claims of Several Persons—Woodman's Lien for Wages Act, R.S.O. 1914, ch. 141, secs. 11, 33—Jurisdiction of District Court—"Claim"—"Person"—Interpretation Act, R.S.O. 1914, ch. 1, sec. 28 (i).*

The Woodman's Lien for Wages Act, R.S.O. 1914, ch. 141, allows the combination of two or more claims (sec. 33); and the word "claim" in sec. 11 refers to the whole amount claimed in the action. Several woodmen, whose individual claims amount each to less than \$200, but in the aggregate amount to more than \$200, may join in one action, in the District Court, to enforce their claims—they are not obliged to sue separately in the Division Court. "Person," in the first line of sec. 11, may mean "persons," by force of sec. 28 (i) of the Interpretation Act, R.S.O. 1914, ch. 1.

Judgment of the District Court of the District of Temiskaming reversed.

APPEAL by the plaintiffs from the judgment of the Judge of the District Court of the District of Temiskaming dismissing this action, which was brought by six woodmen to enforce their liens for wages, under the Woodman's Lien for Wages Act, R.S.O. 1914, ch. 141, on certain pulpwood belonging to the defendant. Each woodman's claim was in amount less than \$200; the claims aggregated \$310.20. The learned District Court Judge was of opinion that his Court had no jurisdiction, and on that ground dismissed the action.

The following sections and portions of sections of the Act relate to the matters in question:—

6.—(1) A person performing labour shall have a lien upon the logs or timber in connection with which the labour is performed for the amount due for such labour. . . .

7. The lien shall cease unless the claim therefor is filed and proceedings are taken to enforce the same as hereinafter provided.

8.—(1) The person claiming the lien shall state his claim in writing. . . .

(2) The claim shall be verified by the affidavit of the claimant. . . .

9.—(1) . . . the claim and affidavit shall be filed in the office of the District Court of the Provisional Judicial District in which the labour or some part thereof was performed. . . .

11.—(1) Any person having a lien upon logs or timber may enforce the same by suit, where the claim does not exceed \$200, in the Division Court within whose jurisdiction the logs or timber or any part thereof may be at the time of the commencement of the suit, or, where the claim exceeds \$200, in the proper District Court where the claim is filed, and such suit may be commenced to enforce such lien, if the claim is then payable, immediately after the filing of the claim, or, if credit has been given, immediately after the expiry of the period of credit, and such lien shall cease unless the proceedings to enforce the same are commenced within 30 days after the filing of the claim or after the expiry of the period of credit. . . .

33. Any number of lien-holders may join in taking proceedings under this Act, or may assign their claims to any one or more persons, but the claim to be filed under section 8 shall include particular statements of the several claims joined, which shall be verified by the affidavits of the persons so joining, or separate claims may be filed and one writ . . . issued on behalf of all the persons so joining.

September 22 and 23. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

*J. M. Ferguson*, for the appellants, argued that the learned District Court Judge had erred in holding that he had no jurisdiction. So long as the claim or combination of claims exceeded

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\$200, it could, by the operation of secs. 11 and 33 of the Woodman's Lien for Wages Act, R.S.O. 1914, ch. 141, be tried in the District Court.

*H. S. White*, for the defendant, respondent, contended that the learned District Court Judge was right. When a claim is less than \$200, an action will lie in a Division Court, under sec. 11 of the Act. Section 11 uses the word "claim" throughout, not "claims." In the present case there were several "claims." The section also referred to any "person," not "persons," as here.

*Ferguson*, in reply, said that a construction founded upon the difference between "claim" and "claims" would be too narrow, and at any rate sec. 33 referred to "claims." Any difficulty as to "person" and "persons," is met by the provision of the Interpretation Act, R.S.O. 1914, ch. 1, sec. 28 (i), providing that words importing the singular number only shall include more persons of the same kind than one.

October 4. The judgment of the Court was delivered by RIDDELL, J.:—Six woodmen, all of the township of Bonfield, claimed a "woodman's lien" for wages on certain pulp-wood and ties belonging to the defendant. Each claim was under \$200: and the total amounted to \$310.20. They united in one action and issued one writ in the District Court of the District of Temiskaming.

No proceedings were taken to set aside the writ; pleadings were delivered, and the action came down for trial before His Honour Judge Hartman on the 4th June, 1915.

The learned District Court Judge thought his Court had no jurisdiction, and dismissed the action. The plaintiffs now appeal.

Apparently the learned Judge was of the opinion that the language of sec. 11 of the Act R.S.O. 1914, ch. 141, imports that every claim under \$200 must be brought in the Division Court, although it might, under the provisions of sec. 33, be combined with another or others in one action, bringing the whole amount claimed in the one action over \$200.

We think the learned Judge is wrong in his interpretation of the statute.

The law allows the combination of two or more claims (sec. 33): and the word "claim" in sec. 11 refers to the whole amount claimed in the action.

All difficulty which might arise from the use of the word "person" in the first line of sec. 11 is got over by the Interpretation Act, R.S.O. 1914, ch. 1, sec. 28 (i).

The appeal must be allowed with costs, *i.e.*, all costs thrown away in the Court below and the costs of this appeal.

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RE TOWNSHIP OF COLCHESTER NORTH AND TOWNSHIP OF  
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RE TOWNSHIP OF GOSFIELD NORTH AND TOWNSHIP OF ANDERDON.

*Municipal Corporations—Drainage—Injuring Liability—Drainage Scheme—Cost in Excess of Benefit—Report of Engineer—Appeal to Drainage Referee—Municipal Drainage Act, R.S.O. 1914, ch. 198.*

The Municipal Drainage Act (now R.S.O. 1914, ch. 198) cannot be invoked to justify a drainage scheme upon which money is to be thrown away. Where a drainage scheme cannot be carried out except at a cost in excess of the benefit, the work should not be proceeded with; and the Drainage Referee has jurisdiction to prevent such work being proceeded with, where there is an appeal to him, under sec. 67, from the report of an engineer.

*Gosfield South v. Mersea* (1895), 1 Clarke & Scully's Drainage Cases 268, a decision of the Drainage Referee, approved.

*Re Township of Orford and Township of Aldborough* (1912), 27 O.L.R. 107, and *Re Township of Huntley and Township of March* (1909), 1 O.W.N. 190, 14 O.W.R. 1033, distinguished.

Where the proposed work was to cost more than \$100,000, of which one of the appellant township corporations was (according to the report) to pay more than \$50,000, and the pecuniary advantage—there was no other advantage—was less than \$50,000, the judgment of the Drainage Referee, affirming the report of the engineer, was reversed, and the report set aside.

Two appeals from a judgment of George F. Henderson, K.C., Referee under the Drainage Laws.

In the first appeal, the appellants were the Corporations of the Townships of Colchester North and Sandwich South and the Corporation of the Town of Essex, and the respondents were the



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Corporations of the Townships of Anderdon, Malden, Colchester South, Gosfield South, and the Michigan Central Railroad Company. In the second appeal, the appellant was the Corporation of the Township of Gosfield North, and the respondents were the Corporations of the Townships of Anderdon, Malden, Colchester South, Sandwich South, Colchester North, the Corporation of the Town of Essex, and the Canada Southern Railway Company.

The reasons for judgment of the Referee (6th May, 1915), in which the facts are stated, were as follows:—

There are two appeals in question, one launched by the Townships of Colchester North and Sandwich South and the Town of Essex against the Township of Anderdon, and the other launched by the Township of Gosfield North as against the other townships interested, and each including, as a party defendant or respondent, the Michigan Central Railroad Company, in one case by the name of the Canada Southern Railway Company. The railway company has delivered a pleading in the action, but has taken no part in the hearing other than to ask at the outset that, whatever the events might be, it should no be visited with an order for costs.

The drainage scheme in question is one prepared by Mr. J. J. Newman, under instructions from the Township of Anderdon, and is a scheme for the improvement of that portion of the river Canard which runs through the township of Anderdon. This river—notwithstanding the uncomplimentary remarks passed upon it by some of the witnesses, I think it is entitled to its time-honoured name of “river”—has its rise in some small swales in the township of Gosfield North, assumes a defined course in the township of Colchester North, then runs through that township for about 11 miles until it enters Anderdon, through which it proceeds for some 14 miles into the Detroit river. Mr. Newman’s report proposes improving 9 miles of that course, ending at a point where his proposed drain will come to the dead level of the Detroit river, a point beyond which it would be of course useless to attempt any improvement. There is no criticism of the outlet, nor is there any serious criticism as to the size of the drain.

Mr. Flater, an engineer whose evidence is always received with respect, suggested that the drain would be unnecessarily large, but he did not give any calculation or make any recommendation as to the exact size. He based his evidence almost entirely upon text-book experience, and did not support it by going into all the elements which I think necessary to justify a complete criticism of the capacity of the proposed drain.

Mr. McCubbin agrees with Mr. Newman in thinking a drain of the size proposed to be necessary; and, according to the other evidence on that subject, I am satisfied that the drain is not unduly large. I mention this phase in passing merely to dispose of the question as raised by the evidence, and I mention it at the outset because the objection raised in the evidence was not pressed by counsel in argument—counsel, I think, appreciating that the evidence would not warrant him in pressing the objection.

Mr. Rodd, for Colchester North, and the appellants in that appeal, calls attention to the fact that there would have been, under the former state of the law, a doubt as to the sufficiency of the petition and as to the effect of the delay in the preparation of the report over a period of time during which ownership has changed by reason of death or otherwise, and he mentions these points, not as objections in law to the legal sufficiency of the report, but as points which he thinks it proper to mention, and points which the Court should have in mind in considering the strictly legal objections. I mention them in passing to shew that Mr. Rodd's argument in that regard has been appreciated. His third point is, that the cost of the work is out of proportion to the benefits to be derived from the work, and that, if that is a fact, I should exercise a discretion and refuse to permit the work to be carried out. The authority conferred upon the Drainage Referee under the 67th section of the Municipal Drainage Act, R.S.O. 1914, ch. 198, is very wide indeed. Mr. Rodd is probably right in contending that I have a discretion under clause (a) of sub-sec. (2) of that section; but he, no doubt, would agree with me that any discretion must be exercised upon judicial principles, and in order to exercise that discretion I must find a legal principle underlying such exercise.

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My difficulty is, that the evidence is uniform to the effect that there is no portion of the Canard river which is a proper outlet, in the strict sense, for a scheme under the Municipal Drainage Act. I would have had some hesitation in speaking frankly on that subject if this scheme were not under way, for there are many places in this Province where trunk courses such as this is are very doubtful as to their sufficiency as drainage outlets. The Canard river is the only outlet for a very large section of what many people consider to be the finest land in the Province of Ontario, and the situation arising from the evidence in this action is one which must be seriously considered.

In discussing this evidence (as I usually do) in the presence of a large number of people who are personally interested in the result of this litigation, and desiring that they should properly appreciate the motive which leads me to decide as I propose to decide, I feel very anxious that they should realise the very serious position in which this portion of the county of Essex has been for some years past, and that they should appreciate the fact, which is a fact, as well as a matter of law, that they have for some years past owed their drainage to the generosity of their neighbours who own land through which the Canard river runs. The law of this Province is, that every man is entitled to the natural run of water through his property, but no man is entitled by artificial means to send one drop of water forward to his neighbour, to the detriment of his neighbour. The people who own flats, as they are called, along the valley of the Canard river, have been for many years submitting voluntarily to a burden, which on this evidence I find to have been constantly increasing, of water sent down upon their flat lands from the other portions of the drainage area. It is a fortunate thing that they have thought well to bear that burden. If I am right in my understanding of the law, any man at the outlet of any one of these subsidiary streams might at any time have asked for an injunction restraining those upstream from sending water down that stream on to his land without carrying it to a proper outlet.

Now I have in many cases in the past (and I have no doubt

I shall in the future) find some means of permitting small drainage schemes to be constructed where there is considerable doubt as to the sufficiency of their outlet, but that is no reason why persons undertaking a work of improvement of a main drainage scheme (even though the work of improvement has been long delayed) should not obtain the assistance which the Drainage Act is intended to give them.

I must assume, because there is no criticism of the assessments, that Mr. Newman has properly adjusted the assessment between the several parties interested. I must assume also that the owners of the flats are paying their full share of the assessment for the benefit which this drain will give them, and that Mr. Newman has properly taken into account the fact that they are going to derive benefit as well as being relieved from the water which is brought down upon them.

Too much stress cannot be laid upon the fact that the Canard is the only drainage outlet for this whole area, and too much stress cannot be laid upon the fact that this part of the country cannot be cultivated without drainage. The evidence is not altogether distinct upon this record, but we all know that this is a report of the country where drainage is absolutely essential to the cultivation of the farms; and, if the Canard were not used as a drainage outlet, the farmers throughout this whole area would, practically speaking, have to go out of business. Therefore, what seems to be a large expenditure becomes comparatively a small amount in view of the enormous amount of the value of the several properties interested in this drainage work. Therefore, the contention that the cost of the drainage scheme is out of proportion to the benefit to be derived is met by the fact that, after all, the real benefit which is being derived from this scheme is that something is now to be done which should have been done many years ago. There is no portion of this western peninsula of Ontario which can be drained too much. I have no hesitation in coming to the conclusion that this is a necessary drainage work, and the only regret is that it was not undertaken and carried through by the Township of Colchester North when Mr. Laird made his report some five years

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ago, at a time when labour was cheaper, and the result now sought to have been accomplished could have been accomplished at a much less cost.

Mr. Rodd's further contention is, that the assessment for outlet should be an assessment for injuring liability, and that the evidence shews that the engineer did not make an examination sufficient to justify him making an assessment for injuring liability.

It may seem impertinent for me to make any suggestion concerning a decision of the Supreme Court of Canada, and I refer to the decision in the case of *Sutherland-Innes Co. v. Township of Romney* (1900), 30 S.C.R. 495, only to emphasise the fact that in administering the Drainage Act as I do (notwithstanding the strict reading of that Act by the late lamented Mr. Justice Gwynne in that case) I do so, not in any spirit of disregard of his judgment, but knowing that with the development of modern times conditions have so changed that the public mind requires that the Act be administered with just so much disregard of technical interpretation as one may feel justified in giving to it as regards any particular case which arises at a particular time.

Mr. Newman has been exceedingly frank in this case, and he gave some evidence as to his method of procedure, which, if the Act were interpreted as strictly as a technical reading of the *Sutherland-Innes* case would call for, would perhaps necessitate the setting aside of his report; but, while I see that plainly, I see on the other side that my plain duty is to say to Mr. Newman that he has acted honestly and honourably in giving the evidence that he did in the box, and that I consider what he did was rightly done. Everything depends on the character of the land. There may be a piece of country where an engineer cannot properly make a report without the careful calculations which the statute indicates, and which the *Sutherland-Innes* case appears to render necessary. On the other hand, in a country such as that with which we have to deal in this case (and still more markedly in the plains to the west of this portion of the country), it would be almost silly for an engineer to waste time

in undertaking instrumental examinations to do something which he can easily do as a result of his observations. If Mr. Newman had gone over this very large area with his instruments, he could have justified his action under the Act, and he could have brought in a correspondingly large bill of engineering expenses to the farmers who are concerned in this scheme. I am satisfied that he accomplished practically the same result as if he had done his work instrumentally; and that, going about it as he did, he acted properly.

It is a very open question whether the assessment on lands in Gosfield North should be for injuring liability or for outlet liability. I have more than once pointed out that there are cases where the line between injuring liability and outlet liability is so fine as to be almost imperceptible. In *Re Township of Orford and Township of Aldborough* (1912), 27 O.L.R. 107, an explanation of what I mean will be found, and with that reference it is unnecessary for me to explain further what I mean. I have no evidence here other than that of Mr. McCubbin, and a slight reference of Mr. Newman, upon which I can say whether or not there would be any difference in the amount of the assessments if Mr. Newman had assessed for injuring liability instead of for outlet liability. I am quite satisfied that it was competent for an engineer in this case to assess either one way or the other. I am inclined to think that it would have been somewhat more scientific if he had assessed the lands in Gosfield North as for injuring liability because of their distance from the proposed drainage work; but, after all, he is right in the theory upon which he acted, that, inasmuch as the drains in Gosfield North and Colchester North have never had an outlet in law, and this scheme will give them an improved outlet in law, they are therefore properly assessable for outlet. My impression is, that, if the assessment had been for injuring liability, instead of for outlet liability, it would have been higher than it is; I cannot imagine how it could have been lower; and, therefore, I have no hesitation in accepting the evidence that at all events it can make no difference. If I had thought it would make any difference, I should have power, with the consent of the engineer, to

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substitute the one term for the other at the head of the column; but, in my view of the case, that is not necessary.

In this rough way I have covered, I think, the objections which have been raised, and it seems to me that they must fail, and that both appeals must be dismissed.

Some criticism was directed against the assessment for bridges. Mr. Newman's report provides that the township shall pay 60 per cent. and the drainage area 40 per cent. of the cost of construction of highway bridges, and that these shall in future be maintained by the drainage scheme as a whole. Permanent structures are provided, and maintenance is not expected to be a serious item. Mr. Brackin is apprehensive lest some of these highway bridges shall be destroyed in some way, and that his clients will have to reconstruct them. It is not likely that that contingency will arise; and the only criticism offered in evidence overlooks the fact that the evidence establishes that the bridges have to be enlarged, not lessened, in size. In this case the fact is that the water artificially brought to the Canard by the scheme in the appellant townships is injuring the approaches to the bridges to such an extent that further approaches will be necessary, even if the scheme is confined within the banks of the proposed work.

Mr. Meredith suggests that I should find upon the evidence the extent to which the lands (which in the evidence have been called flats) along the Canard will be increased in value by the proposed work. The contention of the appellants is that Mr. Newman's valuation of these lands in their present condition is \$15 an acre. They accept that valuation, and I do not understand that the respondents object to it as a valuation. Mr. Baird, who has had an exceedingly wide experience in this section of country, and is, in my opinion, well qualified to speak on questions of value (not as a real estate operator, but as a well-informed drainage engineer), says that these flats, after being drained, will be the very best land in the township, and that they will be worth \$100 an acre. We attempted an inspection the other day. The weather was so bad that I did not attempt to rely upon anything which we saw during the course of the

inspection, but we did see enough to appreciate the fact that this is a very valuable country, and that the farms are highly productive; so I see no reason whatever why Mr. Baird's evidence should not be accepted; and my finding of the evidence is that the flats there, now worth \$15 an acre, will after the improvement be worth \$100 an acre.

As to costs: I have to-day for the first time to put into force in this county a new procedure. Strong representations have been made to those in authority over us with regard to the large amount of legal expenses incurred in this portion of the Province in connection with the drainage trials. I have done my best to check expenditure of that kind, and sometimes think I have made myself a little absurd because of the frequency with which I advise the farmers to spend their money digging drains instead of fighting law-suits. This year I found that it was the intention of those in authority to change the Act and eliminate costs from drainage trials. As a matter of experiment I have promised for the year's end, or rather during the balance of this year's end, 1915, to make each party pay its own costs in any case where I feel that that can be done within the bounds of reason. There are many cases where, I think, that cannot be done, but clearly in a case such as this it can be done. It is not my own idea, but it is an experiment which is going to be tried out during the year 1915. Unless in a very exceptional case, any assessment appeal during this year will have that result as to costs. Because of the experiment now being tried as to costs in these cases, each of the parties interested shall pay its own costs—those, of course, as between solicitor and client to be taxed, if thought necessary by any party.

The following were the reasons for the appeals in both cases:—

1. That the drainage work in question was not based upon a petition sufficient in law, by reason of the area described in the petition being smaller than the true area sought to be drained; and that those who properly signed the petition for the said work do not constitute a real majority.

2. That the work in question should have been ordered to be

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abandoned under the provisions of the Drainage Act because the cost of the proposed work will be out of all proportion to the benefit to be derived therefrom.

3. The assessment upon the appellants is for outlet, when in fact no improved outlet is provided for, and the assessment upon the appellants is, therefore, illegal. The learned Referee has apparently misconceived the true meaning of outlet liability under the Drainage Act, as applied to the facts of this case. Admittedly, no improved outlet of any kind is proposed to be given to the lands in the upper townships by the work in question, and an improved outlet is the very foundation for an assessment for outlet.

4. On the other hand, there can be no assessment upon the upper townships for injuring liability because:—

(a) The artificial drains will not discharge their waters directly into this drainage work, but will be connected with it only by virtue of a stretch of the river Canard, a natural water-course.

(b) The lands proposed to be drained (the bed-lands of the river) were annually submerged in a state of nature, and the only effect created by the higher artificial drains is to increase the depth of water upon the said lands at flood-time, such increased depth causing no additional injury whatever.

5. If, in any event, it is held that the upper townships are assessable for either outlet or injuring liability, the engineer has not taken such levels, nor made such measurements or tests, as would enable him to determine the speed and volume of the water, without which such assessment must be illegal.

6. The river Canard is a natural watercourse, with steep high banks, and the Township of Anderdon had no right to invade this river with its road embankments, nor had it any right to claim assistance from the drainage area to construct its bridges over the stream, and no part of the cost of any of the bridges should be charged to the drainage scheme. In any event, the direction made by the engineer in his report for the maintenance of the bridges is unfair, unjust, and illegal, and will result in permitting the Township of Anderdon to escape an undoubted responsibility in this connection.

September 20 and 21. The appeals were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

*J. H. Rodd*, for the appellants in the first case. The drainage work in question was not based upon a petition sufficient in law, by reason of the area described being smaller than the true area sought to be drained, and those who signed the petition did not constitute a real majority: *Re Duane and Township of Finch* (1908), 12 O.W.R. 144. The engineer's report was not filed within a reasonable time: *In re McKenna and Township of Osgoode* (1906), 13 O.L.R. 471. The assessment upon the appellants is for outlet, when in fact no improved outlet is provided for. There can be no assessments upon the upper townships for injuring liability, because the artificial drains will not discharge their waters directly into this drainage work, but will be connected with it only by a stretch of the river Canard, a natural watercourse. Besides, the lands proposed to be drained were annually submerged in a state of nature, and the only effect created by the higher artificial drains is to increase the depth of the water upon the said lands at flood-time, such increased depth causing no additional injury whatever: *Sutherland-Innes Co. v. Township of Romney*, 30 S.C.R. 495; *In re Township of Caradoc and Township of Ekfrid* (1897), 24 A.R. 576; *Re Township of Elma and Township of Wallace* (1903), 2 O.W.R. 198; *Township of Sandwich South v. Township of Maidstone* (1914), 6 O.W.N. 538, 26 O.W.R. 704; *In re Township of Rochester and Township of Mersea* (1899), 26 A.R. 474; *Broughton v. Township of Grey and Township of Elma* (1897), 27 S.C.R. 495. If it is held that the upper townships are assessable for either outlet or injuring liability, the engineer has not taken such levels, nor made such measurements or tests, as would enable him to determine the speed and volume of the water, without which such assessments must be illegal. The work should have been ordered to be abandoned under the provisions of the Drainage Act, because the cost of the proposed work will be out of all proportion to the benefit to be derived therefrom: *Gasfield South v. Mersea* (1895), 1 Clarke & Scully's Drainage Cases 268; *Township of Raleigh v. Township of Harwich* (1897), *ib.* 348.

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*R. L. Brackin*, for the appellant in the second case. Gosfield North lies some distance from the work. It is drained into the Canard river, and will still drain into it. Its water must flow 11 miles before it reaches the work. There will be no better outlet than at present. And yet we are assessed for outlet. There is no evidence that the waters from Gosfield North do any greater damage than they did when the country was in a state of nature.

*T. G. Meredith*, K.C., and *J. M. Pike*, K.C., for the respondents. All the lands in Colchester North and Gosfield North are drained down on us by 75 artificial drains. To overflow a river by a drainage scheme is unlawful. There must be a proper outlet: *Northwood v. Township of Raleigh* (1882), 3 O.R. 347; *Young v. Tucker* (1899), 26 A.R. 162; *Re Township of Orford and Township of Aldborough*, 27 O.L.R. 107; *McGuire v. Township of Brighton* (1912), 7 D.L.R. 314. These lands above are properly charged: *Township of Orford v. Township of Howard* (1900), 27 A.R. 223; *Re Township of Huntley and Township of March* (1909), 1 O.W.N. 190, 14 O.W.R. 1033; *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446. The duty of municipal councils in regard to highways is paramount to that in respect of drainage, because highways are for the public benefit: *Township of Euphemia v. Township of Brooke* (1898), 1 Clarke & Scully's Drainage Cases 358; *Township of Mersea v. Township of Rochester* (1899), 2 Clark & Scully's Drainage Cases 47. The Courts should not interfere with the local councils in matters of drainage: *Re Stephens and Township of Moore* (1894), 25 O.R. 600, at p. 605.

*Rodd*, in reply, referred to *Wigle v. Township of Gosfield South* (1912), 2 D.L.R. 619; *Gibson v. Township of North Easthope* (1894), 21 A.R. 504.

October 4. RIDDELL, J.:—In and through the county of Essex runs the river Canard; its waters finally make their way into the Detroit river, but for some distance they are dispersed in what may be called a swamp. In the township of Anderdon, the river flows more or less near the middle line of a valley averaging between 450 and 500 ft. wide, with well-

defined walls, up to which the water rises from time to time in flood. The land on the floor of this valley on either side of the stream is fertile, but is rendered comparatively valueless by the occasional overflow of the river.

A petition was presented under the Municipal Drainage Act (now R.S.O. 1914, ch. 198) to the Council of Anderdon, having for its object (in substance) the prevention of this flooding and the utilisation of the floor of the valley. This petition was filed on the 29th April, 1912. After a somewhat unusual delay, the engineer, Newman, made a report dated the 21st July, 1914, and filed the 31st August, 1914. The report held certain of the townships higher up the river responsible for some of the damage occasioned by overflows which would be prevented in future by the proposed work (R.S.O. 1914, ch. 198, sec. 3(3)), and saddled them with a considerable sum which should, it is said, have been termed "injuring liability." These townships appealed to the Drainage Referee under sec. 67, and the appeals were dismissed. From that decision the present appeals are taken.

Several irregularities, etc., were urged by counsel for the appellants, which I do not think it necessary to notice, as, in my view, the matter should be decided on a very simple ground.

The work will cost in all over \$100,000, of which the appellant Colchester North will pay over \$50,000, the appellant Gosfield North \$11,000 (odd). By no ingenuity can the pecuniary advantage, direct or indirect, be brought up to \$50,000. There is no other kind of advantage suggested, æsthetic, piscatory, or otherwise.

It is manifest that such a scheme should never be approved of. It would be throwing away money, never too plentiful in this Province, and especially valuable at this most critical time.

It is not as though those who are injured have no remedy; the Courts are open, and full compensation may be had from any offending municipality or person.

It would pay these municipalities to consent to a verdict for the full amount by which the lands would be benefited—and indeed for the full value of the lands—rather than submit to the preposterous scheme proposed.

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That it never was intended that this Act should be made a means of throwing away money is at least indicated by the judgment of the Court of Appeal in *McGillivray v. Township of Lochiel*, 8 O.L.R. 446, at p. 453, where, referring to the Act now in question, the Court says: "The whole stream could be so deepened and enlarged as to afford ample drainage . . . at an expense which, while no doubt considerable, would still be far below its great advantage. . . ."

In *Gosfield South v. Mersea*, 1 Clarke & Scully's Drainage Cases 268, Britton, Drainage Referee (now my brother Britton). says (p. 270): "Whenever a case occurs where the work to benefit petitioners cannot be done except at a cost far in excess of the benefit directly upon, and by furnishing an improved outlet for, any and all lands assessed, such work ought not to be proceeded with merely for the sake of such benefit."

I entirely agree in this, and would approve the decision in that case.

It was then argued that the Referee, and therefore the Court, could not interfere; that the Council it was upon which was cast by the Legislature the responsibility of determining the feasibility and advisability of the proposed work.

My brother Britton says in the case cited, at p. 270: "It may be answered that is a matter of judgment and discretion to be exercised by the Council, and if such is within the statute, the Referee has no jurisdiction to prevent it. I am of opinion that the Referee has jurisdiction and should deal with it on appeal by another municipality."

This I think to be law. The grounds of appeal to the Referee, sec. 67 (2), include: "(1) that the scheme of the drainage work . . . should be abandoned . . . on grounds to be stated." On an appeal to the Referee, he must consider the objections to the scheme advanced by the appellant, and no stronger ground could be suggested than that the scheme would cost more than it was worth.

We should follow and approve this decision—I find nothing in judgments binding on us, opposed to it.

We have been specially referred to *Re Township of Orford and Township of Aldborough*, 27 O.L.R. 107, and *Re Township*

of *Huntley and Township of March*, 1 O.W.N. 190, 14 O.W.R. 1033. By a reference to the Appeal-book No. 213 (N.S.) in the Osgoode Hall Library, it will be seen that in the first of these cases the engineer gives an estimate of the cost, but nowhere (that I can find) of the total benefit. The point is not mentioned in the judgment of the Referee: on appeal, the appellants do not state as a ground of appeal that the cost exceeds the benefit—para. 2, p. 121, says: "The cost of the work is so great in proportion to the benefit to be derived," etc., etc. Even this does not seem to have been argued (27 O.L.R. at p. 116), and the Court in giving judgment do not mention the point.

In *Re Township of Huntley and Township of March*, 14 O.W.R. 1033, Appeal-book No. 191 (N.S.), the appellants did set up as a ground of appeal that the cost would exceed the benefit—this is not admitted in the reasons against appeal, and I find no evidence to support it. No reference is made to this point, one of the greatest importance, in the judgment of the Court of Appeal: and I am informed by Mr. Justice Garrow that the point was not taken on the argument.

I think the Referee should have allowed the appeals to him, and consequently the appeals to us should be allowed.

The appellants should have their costs throughout.

FALCONBRIDGE, C.J.K.B., and LATCHFORD, J., concurred.

KELLY, J.:—The one ground on which I rest my conclusion in these cases is that of the relative cost of the work sought to be carried out. Taking the lands intended to be benefited at the highest value which, on the evidence, they will attain as the result of carrying out this drainage scheme, the estimated cost of the work is more than double that value, and a very substantial part of this estimated cost is charged against lands in the two municipalities now appealing. I cannot bring myself to believe that the object aimed at by the provisions of the Drainage Act should be attained with any such extraordinary result, or that the Legislature intended that it should be so. If this conclusion is wrong, then there is no limit to the expense which may be imposed upon municipalities and property-owners in such proceedings to benefit lands of even small value or small

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area. Unless bound by positive provision of the Legislature or by some authority equally binding, I am not prepared to go so far as the respondents contend for; and I have been unable to find anything so binding upon this Court.

Since the argument there have been submitted to us two cases in appeal, *Re Township of Orford and Township of Aldborough*, 27 O.L.R. 107, and *Re Township of Huntley and Township of March*, 1 O.W.N. 190, 14 O.W.R. 1033, in each of which—it is stated by counsel—the appeal-book contains a reference to the inequality between the total cost of the work and the estimated benefit to the lands, and in both the work petitioned for was approved of. The judgments, however, nowhere indicate that this aspect of the matter was there considered. On the other hand, the views of Referees, in cases decided a considerable time ago, and which can be supported on reasonable grounds, are opposed to such excessive expenditure. In 1895, Mr. Justice Britton, who was then Drainage Referee, in *Gosfield South v. Mersea*, reported in 1 Clarke & Scully's Drainage Cases 268, said: "Whenever a case occurs where the work to benefit petitioners cannot be done except at a cost far in excess of the benefit directly upon, and by furnishing an improved outlet for, any and all lands assessed, such work ought not to be proceeded with merely for the sake of such benefit."

A similar view was entertained by the Referee who in 1891 heard the appeal in *Township of Raleigh v. Township of Harwich* (1897), 1 Clarke & Scully's Drainage Cases 348, where he says: "Other systems of drainage are put forward by the appellants; but, in view of the greater difficulty and expense of their construction, I do not feel warranted in allowing the appeal on that ground, especially when such expense would be largely in excess of the value of the land when relieved and benefited." This case went to appeal, and is reported in (1899), 26 A.R. 313, *sub nom. In re Township of Raleigh and Township of Harwich*, but this view of the Referee was not disturbed. These opinions are consistent with what is a common sense view of the situation.

Numerous authorities were cited to us in support of the respondents' position, but these decisions rest on other grounds, quite irrespective of the reasons now urged by the appellants.

I am not prepared to take the responsibility of saddling upon the appellants the share allotted to them of the enormous expense of the proposed work, altogether out of proportion as it is, not only to the benefit to accrue to the lands to be benefited, but to the value of the lands themselves.

The appeal in each case should be allowed with costs.

*Appeals allowed.*

[NOTE: One of the township corporations was an appellant in one appeal and a respondent in the other; it moved that its costs should be allowed in the appeal in which it was respondent. This was refused, and it was held that, being a party to the original action, when it omitted to become an appellant, and so compelled the other township corporation to make it a party respondent, it should not have its costs, although it on the argument made common cause with the active appellant. Its costs were allowed in the case in which it was appellant.]

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[APPELLATE DIVISION.]

MANNING V. CARRIQUE.

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Oct. 5.

*Contract—Sale of Bank Shares—Written Offer—Ambiguity—Contemporaneous Interpretation by Conduct of Parties—Acceptance—Reasonable Time—Article of Fluctuating Value.*

Where a written offer is ambiguous, it may be construed according to the contemporaneous interpretation put upon it by the maker and receiver. The third parties, Toronto brokers, offered the defendant 50 shares of Royal Bank stock at 202. Instead of accepting or rejecting, the defendant wrote to the plaintiffs, Montreal brokers: "I will sell 50 shares Royal Bank at 206. Please wire if you have a buyer on receipt hereof." The plaintiffs, treating this as an offer to sell to them, at once telegraphed an acceptance; and the defendant then signified his acceptance of the offer made on the previous day by the third parties; but they refused to deliver the shares; and the defendant did not carry out the sale to the plaintiffs:—

*Held*, that the letter of the defendant was ambiguous; and, as he and the plaintiffs had, in subsequent correspondence and otherwise, treated it as an offer to sell to the plaintiffs, that contemporaneous interpretation should be adopted.

Judgment of the County Court of the County of York awarding the plaintiffs \$300 damages for breach of the defendant's agreement to deliver the shares, affirmed.

The third parties were *held* not liable over to the defendant; for their offer was not, having regard to the fluctuating nature of the article offered, accepted within a reasonable time.

Judgment of the County Court of the County of York on this question reversed.



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APPEALS by the defendant and the third parties from the judgment of the County Court of the County of York in an action to recover \$750 damages for the refusal of the defendant to deliver 50 shares of Royal Bank stock, pursuant to an alleged agreement. The judgment of the County Court was in favour of the plaintiffs for \$300 without costs, and for the defendant against the third parties for relief over or indemnity and for costs.

October 4. The appeals were heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

*T. N. Phelan*, for the defendant, appellant, argued, first, that the communication addressed by the defendant to the plaintiffs was simply an inquiry directed to them as brokers asking them to put the defendant in touch with some client of theirs. It was not an offer to sell to the plaintiffs: *Butler v. Murphy & Co.* (1909), 41 S.C.R. 618. Secondly, even if the post-card should be treated as an offer, the acceptance by the plaintiffs was such a variation of the offer that no contract resulted: *Bentley v. Nasmith* (1912), 46 S.C.R. 477.

*A. G. Ross*, for the plaintiffs, respondents, contended that the communications interchanged between the defendant and the plaintiffs amounted to an offer and acceptance, and constituted a binding contract. The defendant did not care to whom he sold. Both parties all along treated the post-card as an offer to sell to the plaintiffs: *Philp & Co. v. Knoblauch*, [1907] S.C. (Sess. Cas.) 994.

*H. S. White*, for the third parties, appellants, contended that they were not bound to carry out their offer to sell the stock to the defendant, because the defendant had delayed an unreasonable time in accepting, considering the fluctuating value of the article offered for sale. Acceptance on the day after the offer was too late.

*Phelan*, in reply.

October 5. The judgment of the Court was delivered by RIDDELL, J.:—The present two appeals are by the defendant

from a judgment of \$300 and costs and by the third parties from an order for relief over against them.

The third parties, a firm of Toronto brokers, not members of the Stock Exchange, offered the defendant 50 shares of Royal Bank stock at 202—the defendant did not accept, but said he would see and let the brokers know. Instead of accepting or rejecting the offer, the defendant wrote to the plaintiffs, a firm of broker-dealers in Montreal, a post-card: "I will sell 50 shares Royal Bank at 206. Please wire if you have a buyer on receipt hereof. J. H. Carrique." The plaintiffs telegraphed at once, treating this as an offer to sell to them—and the defendant then endeavoured to accept the offer made the previous day by the third parties. They refused to supply the required stock, and the defendant could not—at least did not—carry out the sale to the plaintiffs.

The plaintiffs then sued in the County Court of the County of York: the defendant made the Toronto brokers third parties—this order was moved against and affirmed. The objection of the third parties does not appear to have been renewed at the trial, and we thought it was too late to take it before us.

Had the communication above set out stood by itself, it is possible that no contract of sale by the defendant to the plaintiffs could have been found—as the offer might be considered as being made to some customer of the plaintiffs to be found by them. But the post-card is ambiguous; and the parties, both offerer and acceptor, in subsequent correspondence and otherwise, treated the post-card as an offer to sell to the plaintiffs. That interpretation is possible, and it should be adopted, as it was the contemporaneous interpretation put upon it by the parties themselves.

The appeal of the defendant fails and will be dismissed with costs.

We express no opinion as to whether the third party proceeding is regular and such as is contemplated by the Rules.

Dealing with the appeal of the third parties on the merits—an offer for the sale of anything must be accepted, if at all, within a reasonable time—what is a reasonable time must depend

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upon the article offered. Where it is of a fluctuating nature, the time for acceptance must be short, and an offer remains open for a short time only. We think that an offer made as this was, of such stock, must be considered as no longer open on the following day.

The appeal of the third parties must be allowed, with costs throughout.

## [APPELLATE DIVISION.]

## RE TORONTO R.W. CO. AND CITY OF TORONTO.

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Oct. 6.

*Street Railway—Agreement with City Corporation—55 Vict. ch. 99 (O.)—Exclusive Right to Operate upon Streets—Exception—Restriction—Expiry of Franchise of another Railway—Right to Operate upon Portion of Street Released—Order of Ontario Railway and Municipal Board—Submission of Plans to City Engineer.*

Upon the proper construction of the agreement made in 1891 between the Corporation of the City of Toronto and the Toronto Railway Company and validated by the Ontario statute 55 Vict. ch. 99, the grant to the company of the right to operate surface street railways in the city for the term of 30 years from the 1st September, 1891, is not subject to a permanent exception as regards the portion of Yonge street from the Ontario and Quebec Railway (now the Canadian Pacific Railway) tracks to the north city limits; the restriction effected by the franchise of the Metropolitan Street Railway Company being removed during the period of 30 years, the city corporation cannot withhold from the Toronto Railway Company the exclusive right to operate upon the portion of Yonge street referred to, in the same manner as upon the other streets of the city.

*City of Toronto v. Toronto R.W. Co.* (1905), 5 O.W.R. 130, 132 (affirmed in *Toronto R.W. Co. v. Toronto Corporation*, [1906] A.C. 117), followed. An order of the Ontario Railway and Municipal Board declaring the right of the Toronto Railway Company to operate upon the portion of Yonge street referred to was affirmed; and it was *held*, that the proceedings before the Board were a sufficient submitting of the plans to the City Engineer under clause 12 of the conditions of the agreement.

APPEAL by the Corporation of the City of Toronto from a judgment of the Ontario Railway and Municipal Board affirming the right of the Toronto Railway Company to lay tracks and operate their cars upon that portion of Yonge street, within the city limits, lying between the tracks of the Canadian Pacific Railway Company and Farnham avenue.

September 24. The appeal was heard by RIDDELL, LATCHFORD, KELLY, and LENNOX, JJ.

*G. R. Geary*, K.C., and *Irving S. Fairty*, for the appellants, argued that the railway company never had a right to construct a railway upon the northerly portion of Yonge street in question. In 1891, at the time of the agreement between the city corporation and the Metropolitan Railway Company, the city corporation had no power to grant a right beginning twenty-four years afterwards. No franchise could be granted for more than the twenty years limited by sec. 18 of the Street Railway Act, R.S.O. 1887, ch. 171. No franchise *in futuro* could be granted. Counsel also urged that the plans had not been submitted for approval to the City Engineer, as required; and referred in this connection to *Roberts v. Hickman & Co.* (1911), reported in *Hudson on Building Contracts*, 4th ed., vol. 2, p. 426.

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*H. S. Osler*, K.C., for the railway company, respondents, contended that, by the agreement referred to, the city corporation had given to the company whatever rights the city corporation had over the street in question. Whatever the corporation had power to give, it had given. The restriction which had existed as to giving an exclusive franchise over this portion of the street had been since removed, and so the company now had the right under the agreement to operate upon the disputed part. The Court was bound by the decision in the Queen street case, *City of Toronto v. Toronto R.W. Co.* (1905), 5 O.W.R. 130, 132; *Toronto R.W. Co. v. Toronto Corporation*, [1906] A.C. 117. As to the City Engineer not having approved of the plans, the Ontario Railway and Municipal Board had power to make the order, even though the plans had not been approved of by the official. In any event, the proceedings before the Board were a sufficient submitting of the plans.

*Geary*, in reply, said there was a difference between the Queen street and the Yonge street cases. In the latter, at the time of the agreement, the Metropolitan railway was in operation; in the former, the Lake Shore road had not been built.

October 6. RIDDELL, J.:—At the time of the agreement between the City of Toronto and the Toronto Railway Company in 1891, a company, the Metropolitan Street Railway Company, had a "franchise" from the County of York over part of Yonge

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street, including a piece running from the (present) Canadian Pacific Railway tracks to Farnham avenue. This had formerly been in the township of York, but had, a short time before the agreement, been taken into the city and still continues to be in the city.

A company called the Toronto and Mimico Electric Railway and Light Company (Limited) had, before the enactment of the Act validating this agreement, obtained a "franchise" over that portion of Queen street west of Dufferin street. The former company had a road constructed and running at the time of the agreement.

The agreement with the city will be found printed in the Ontario statutes for 1892, p. 899, as schedule A to 55 Vict. ch. 99. By clause 11, the city grants the right to the Toronto Railway Company "to operate surface street railways in the city of Toronto, excepting on the island and on that portion, if any, of Yonge street from the Ontario and Quebec Railway (now the Canadian Pacific Railway) tracks to the north city limits over which the Metropolitan Street Railway claims an exclusive right. . . . and the portion, if any, of Queen street west . . . over which any exclusive right . . . may have been granted by the . . . County of York, and also the exclusive right . . . over the said portions of Yonge street and Queen street west . . . so far as the said corporation can legally grant the same." This agreement was declared valid, legal, and binding by the Act 55 Vict. ch. 99, sec. 1, and the term made 30 years from the 1st September, 1891: "Provided always that nothing contained in this Act nor the confirmation of the said agreement shall limit . . . the rights" of the Corporation of the County of York, the Toronto and Mimico Electric Railway and Light Company (Limited), or the Metropolitan Street Railway Company.

The franchise of the Metropolitan company ran out in June, 1915, and the Toronto Railway Company insist that they have the right to run their undertaking over this part of Yonge street. The Ontario Railway and Municipal Board have affirmed that right, and the city corporation now appeal.

Whatever conclusion we would have arrived at in the absence

of binding authority, I think we are precluded from holding that the right claimed did not pass.

The case of the Queen street west extension has been before the Courts and passed upon by our Court of Appeal and the Judicial Committee: *City of Toronto v. Toronto R.W. Co.*, 5 O.W.R. 130; *Toronto R.W. Co. v. Toronto Corporation*, [1906] A.C. 117.

There the Toronto Railway Company, who operated an extension on the excepted part of Queen street, contended that their right to operate was not derived from the agreement with the city; but this contention was negatived by the Courts. In the Court of Appeal, giving (5 O.W.R. at p. 132) the grounds of the judgment, Moss, C.J.O., says, interpreting the language quoted above: "The grant extends to every portion of the territory. . . . Of the exceptions, the only absolute one is that of the island. The others are qualified. As to them the main grant was intended to take effect and operate save only so far as the existence of any existing conflicting grant might create a restriction. If those portions of Yonge street and Queen street west were part of the city at the time of the agreement, they were covered by the main grant, subject to the restriction. . . . And once they formed part of the city, it would not be open to the plaintiffs to contend that upon the removal of the restriction during the period of 30 years they could withhold from the defendants the exclusive right to operate upon those parts in the same manner as upon the other streets of the city."

Some parts of this judgment are no longer law, but the parts quoted have not been overruled or questioned so far as they affect the present case. The Judicial Committee, [1906] A.C. 117, affirming the judgment, does so in different terms, but does not question the reasoning of the Court of Appeal. The Chief Justice's judgment, is concurred in by the full Court of five Judges. We must follow the decision in its reasoning; if it is to be overruled, it must be overruled by superior authority—we are bound by the statute.

The result is that, the "restriction" effected by the franchise of the Metropolitan company being removed "during the period

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of 30 years," the city cannot "withhold from the (company) the exclusive right to operate upon (this) part in the same manner as upon the other streets of the city."

This disposes of the main ground of the appeal.

It is however said by the city that the City Engineer did not withhold his approval of the plans. Perhaps that might be so, if only that is to be considered which took place before the application to the Board; but the proceedings before the Board were, I think, a sufficient submitting of the plans to him under clause 12 of the conditions of the agreement, p. 908 of the statutes of Ontario for 1892.

The appeal should be dismissed with costs.

LATCHFORD and LENNOX, JJ., concurred.

KELLY, J.:—Appeal from an order of the Ontario Railway and Municipal Board.

The city, in the railway company's application to the Board wherein the order now appealed against was made, contended that the company have not and never had any right to construct and operate a street railway upon that portion of Yonge street referred to in the application, from their present northerly terminus at or near the Canadian Pacific Railway crossing northerly to a point near Farnham avenue.

The agreement by which the franchise under which the company now operate was granted was made in 1891. By it the city granted the exclusive right, for the term there specified, to operate surface street railways in the city of Toronto, excepting on the island and on that portion, if any, of Yonge street from the Ontario and Quebec Railway (now the Canadian Pacific Railway) tracks to the north city limits over which the Metropolitan Street Railway claimed an exclusive right to operate such railways, and the portion, if any, of Queen street west (Lake Shore road) over which any exclusive right to operate surface street railways may have been granted by the Corporation of the County of York: "and also the exclusive right for the same term to operate surface street railways over the said portions of Yonge street and Queen street west (Lake Shore road) above indicated so far as the said corporation can

legally grant the same." The agreement was declared valid and legal by an Act of the Legislature (1892), 55 Vict. ch. 99, and the term of the franchise declared to be for the period of 30 years from the 1st September, 1891. When the agreement was made, the city extended at Yonge street to a line near Farnham avenue.

The franchise of the Metropolitan Street Railway Company to operate a railway on that part of Yonge street expired on the 25th June, 1915, and thereupon the respondents claimed the right under their agreement to extend their tracks upon and operate their railway over that portion of Yonge street for the balance of the term of their franchise, confirmed to them by the statute above referred to. The city disputes the interpretation put upon the agreement by the respondents, and contends that it does not confer upon the railway company the rights they now seek to assert.

Whatever views may be entertained as to the right of the municipality to grant a franchise such as this, not to take effect or which may not come into operation for years after the grant, are, in the present circumstances and so far as this Court is concerned, subject to the judicial interpretation already put upon that agreement.

The part of the agreement now in issue was passed upon by the Court of Appeal in 1905 in *City of Toronto v. Toronto R.W. Co.*, 5 O.W.R. 130, where the action of the railway company in laying their tracks upon and running their cars over a portion of Queen street, or Lake Shore road, referred to in the agreement, was under consideration. The judgment of the Chief Justice of the Court, in which the other four Judges composing with him the Court concurred, is quite positive in the expression of the Court's interpretation of that part of the agreement. At p. 132 the learned Chief Justice says: "Now in this agreement we find, in the first place, a grant in very wide terms, the exclusive right for a period of 30 years to operate surface street railways in the city of Toronto. Standing alone, without the exceptions, this embraces every part of the territorial area comprising the city of Toronto, not only at the date of the agreement, but during the period of 30 years over which the right

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is to extend. The grant extends to every portion of territory acquired or made to form part of the municipality during the 30 years. Of the exceptions the only absolute one is that of the island. The others are qualified. As to them the main grant was intended to take effect and operate save only so far as the existence of any existing conflicting grant might create a restriction. If those portions of Yonge street and Queen street west were part of the city at the date of the agreement, they were covered by the main grant, subject to the restriction. . . . And once they formed part of the city, it would not be open to the plaintiffs to contend that upon the removal of the restriction during the period of 30 years they could withhold from the defendants the exclusive right to operate upon those parts in the same manner as upon the other streets of the city."

That view was not disturbed by the Privy Council.

Mr. Geary forcefully urged a distinction between the cases of the two excepted portions of streets—Yonge street, where at the time of the agreement the Metropolitan railway was in operation, and the Lake Shore road, on which the road had not been constructed. I am unable to reach the conclusion that, if there is any distinction between these two, it is such as to take the present case out of the application of the Court of Appeal's decision.

The only other matter requiring consideration is one of procedure, in the mode by which the respondents laid the foundation for their application to the Ontario Railway and Municipal Board, the contention being that the plans were not, as required, submitted to the City Engineer. Possibly that is so in the first instance; but, when the application came before the Board, and this objection was taken, an adjournment was made, and the attention of the Engineer specially drawn to the purpose for which the plans reached his hands. There was from that time either a neglect or refusal to entertain the plans; and, later on, the Board acted. Under these circumstances, the objection should not prevail.

The appeal fails, and must be dismissed with costs.

*Appeal dismissed.*

[IN CHAMBERS.]

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Oct. 7.

## BOWERS v. BOWERS.

*Lis Pendens—Motion to Vacate Registry of Certificate—Husband and Wife—Separation Agreement—Conveyance of Land to Wife—Resumption of Cohabitation—Action for Declaration that Conveyance Annulled—Speedy Trial—Undertaking.*

A motion to vacate the registry of a certificate of *lis pendens* should not succeed unless it clearly appears that the bringing of the action is an abuse of the process of the Court.

*Jameson v. Lang* (1878), 7 P.R. 404, and *Sheppard v. Kennedy* (1884), 10 P.R. 242, followed.

The conditions of a separation deed may or may not come to an end in the event of the reconciliation of the husband and wife—that depends upon their intention.

Where the plaintiff and defendant, being husband and wife, entered into an agreement for separation, pursuant to which, *inter alia*, land was conveyed by the former to the latter, and this action was brought, after cohabitation had been resumed, to obtain a declaration that the land was still the husband's, and a certificate of *lis pendens* issued and registered, a motion to vacate the registry was refused, upon the plaintiff undertaking to speed the trial of the action.

Upon that motion, a Judge was not in a position to determine that the conditions of the separation deed could not possibly have come to an end by reason of what had transpired; and without so determining he could not grant the motion.

APPEAL by the plaintiff from an order of a Local Judge vacating the registry of a certificate of *lis pendens*.

October 6. The appeal was heard by RIDDELL, J., in Chambers.

*J. M. Ferguson*, for the plaintiff.

*H. S. White*, for the defendant.

October 7. RIDDELL, J.:—Charles R. Bowers and Rebecca Bowers, the plaintiff and defendant, are husband and wife, having been married in June, 1903. Differences arising between the married couple, they, on the 10th August, 1909, entered into an agreement for separation, under which certain lands were conveyed by husband to wife and certain other benefits were secured to her. They separated for about a year and a half, when the husband returned to the wife and resumed cohabitation for three or four weeks; then he went away again for some weeks, and, returning, cohabited with his wife till the 29th May, 1915, when he again left, returning at irregular intervals.

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On the 4th September, 1915, he issued a writ for a declaration that the land is still his, *i.e.*, that the deed is void by reason of the resumption of cohabitation. He procured and registered a certificate of *lis pendens*; the defendant moved before a Local Judge, and an order was made setting aside this certificate. The plaintiff appeals.

Upon the argument the point was attempted to be made that the Local Judge had no jurisdiction to make such an order—I said that, if such were the case, I should treat this motion as a substantive application by the defendant.

A motion to vacate a certificate of *lis pendens* should not (speaking generally) succeed unless it is made to appear by “clear and almost demonstrative proof that the writ is an abuse of the process of the Court:” *Sheppard v. Kennedy* (1884), 10 P.R. 242; *cf. Jameson v. Laing* (1878), 7 P.R. 404.

The conditions of a separation deed may or may not come to an end in the event of reconciliation—that “depends upon the intention of the parties to be ascertained from the terms of the contract as a whole and the circumstances of the particular case:” Halsbury’s Laws of England, vol. 16, p. 452, para. 927.

To vacate this certificate of *lis pendens*, I should, in the absence of special circumstances, have to hold that the conditions etc. of the separation deed could not possibly have come to an end by the occurrence of the facts mentioned. I cannot do that—there may be facts of the utmost importance not disclosed; and no judgment should be given until all the available facts have been threshed out.

But the defendant is endeavouring to sell the land; and the plaintiff must undertake to speed the action, as in *Sheppard v. Kennedy*, 10 P.R. at p. 245, “the plaintiff must serve his statement of claim forthwith and go down to trial at the next sittings of the Court” at Chatham.

A refusal or omission so to do I consider equivalent to an admission by the plaintiff that his action is an abuse of the process of the Court within the meaning of *Jameson v. Laing* and *Sheppard v. Kennedy*.

If, then, on or before Friday the 15th October, the plaintiff

file his statement of claim and with it file an undertaking to go down to the said sittings of the Court, the appeal will be allowed and the substantive application to me refused; if not, the appeal will be dismissed and the application to me allowed; in each case costs in the cause to the successful party.

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Oct. 9.

RE TORONTO R.W. CO. AND CITY OF TORONTO.

*Appeal—Privy Council — Right of Appeal—Order of Appellate Division Affirming Order of Ontario Railway and Municipal Board—Operation of Railway on Highway—Agreement between Railway Company and Municipal Corporation—Privy Council Appeals Act, secs. 2, 3—Ontario Railway and Municipal Board Act, sec. 48 (6).*

It was held, that, under sec. 48 (6) of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, an appeal lay to His Majesty in His Privy Council from an order of a Divisional Court of the Appellate Division dismissing an appeal from an order of the Ontario Railway and Municipal Board allowing a railway company to operate its railway on a certain highway in pursuance of an agreement between the company and a municipal corporation; and an order was made approving the security upon a proposed appeal and allowing the appeal.

The statutory provision referred to expressly covers the case, and sec. 3 of the Privy Council Appeals Act, R.S.O. 1914, ch. 54, applies to the appeal as fully as if it were brought under sec. 2 of that Act.

APPLICATION by the Corporation of the City of Toronto for an order approving the security furnished by the applicants upon a proposed appeal to the Judicial Committee of the Privy Council from the judgment of a Divisional Court of the Appellate Division, *ante* 456, and allowing the appeal.

The application was heard in Chambers by MACLAREN, J.A. C. M. Colquhoun, for the applicants.

D. L. McCarthy, K.C., for the railway company, respondents.

October 9. MACLAREN, J.A.:—The Corporation of the City of Toronto make application for the allowance of their appeal and security bond in an appeal to the Privy Council from the judgment of the Second Divisional Court, of the 6th October, 1915, dismissing the appeal of the city from an order of the Ontario Railway and Municipal Board, which granted the appli-

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cation of the railway company to operate its railway on a certain portion of Yonge street, in the northern part of the city, under the agreement between the city and the company.

The company contend that there is no right of appeal from the judgment in question except by leave of the Privy Council, and cite, in support, the decision of the Privy Council in *E. W. Gillett & Co. Limited v. Lumsden*, [1905] A.C. 601, and the decision of the Court of Appeal in *City of Toronto v. Toronto Electric Light Co.* (1906), 11 O.L.R. 310, and *Canadian Pacific R.W. Co. v. City of Toronto* (1909), 19 O.L.R. 663. These three appeals were, however, all taken under what is now sec. 2 of the Privy Council Appeals Act, R.S.O. 1914, ch. 54, and it was simply held that the judgments in the three cases did not meet the requirements and provisions of that section.

The present application comes under sec. 48(6) of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, which provides that "when the matter in controversy . . . relates to the duration of a privilege to operate a railway along a highway, or to the construction of an agreement between a railway company and a municipal corporation, or to any demand affecting the rights of the public, or to any demand of a general or public nature affecting future rights, an appeal shall lie from the Divisional Court" to the Privy Council. In my opinion, this provision expressly covers the present case, and sec. 3 of R.S.O. 1914, ch. 54, applies to it as fully as if it had been brought under sec. 2 of the last-named Act.\*

The appeal is consequently allowed and the security approved.

\*2. Where the matter in controversy in any case exceeds the sum or value of \$4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council; and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council.

3. No such appeal shall be allowed until the appellant has given security in \$2,000, to the satisfaction of the Court appealed from, that he will effectually prosecute the appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is confirmed.

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*Criminal Law—Keeping Common Gaming-house—Conviction—Evidence —  
“Nickel-in-the-Slot” Machine—Game of Chance—Element of Certainty  
—“Keeper” of Premises—Criminal Code, secs. 226, 228, 986.*

The defendant, a tobacconist, who had in his shop a “nickel-in-the-slot” machine, was convicted for unlawfully keeping a disorderly house, that is to say, a common gaming-house; and it was held, upon a case stated, that there was evidence that the offence charged had been committed: each depositor of a coin in the machine was taking part in a game of chance; there was no element of certainty except as to the minimum to be received—there was no certainty as to the maximum, as the statement of the working of the machine (given below) disclosed.

*Rex v. Langlois* (1914), 23 Can. Crim. Cas. 43, and *Rex v. Stubbs* (1915), 31 W.L.R. 567, not followed.

Section 986 of the Criminal Code (as enacted in 1913 by 3 & 4 Geo. V. ch. 13, sec. 29) makes the keeping of any means or contrivance for unlawful gaming *prima facie* evidence of a disorderly house, in prosecutions under sec. 228 (R.S.C. 1906, ch. 146), which, in sub-sec. 1, fixes the punishment for keeping a disorderly house, that is to say, *inter alia*, a common gaming-house as defined in sec. 226, and in sub-sec. 2 (as enacted by sec. 10 of ch. 13 of 3 & 4 Geo. V.) declares who shall be deemed a keeper. There was sufficient evidence that the defendant was the keeper of the premises and interested in the operation of the machine.

CASE stated by the Deputy Police Magistrate for the City of Ottawa, on a conviction of the defendant for unlawfully keeping a disorderly house, that is to say, a common gaming-house.

The question asked was, whether there was any evidence that the offence charged had been committed.

The evidence—relating to the operation of a “nickel-in-the-slot” machine, kept in the defendant’s shop—is set out in the judgment of the Court.

The following sections and parts of sections of the Criminal Code, R.S.C. 1906, ch. 146, are applicable:—

226. A common gaming-house is,—

(a) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill; or,

(b) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which

(i) a bank is kept by one or more of the players exclusive of the others; or,

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(ii) any game is played the chances of which are not alike favourable to all the players. . . .

228. Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as hereinbefore defined.

2. Any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house, or as assisting in such care, government or management, shall be deemed to be the keeper thereof and shall be liable to be prosecuted and punished as such although in fact he or she is not the real owner or keeper thereof.

(Sub-section 2 is substituted by 3 & 4 Geo. V. ch. 13, sec. 10, for the sub-section as it appears in R.S.C. 1906, ch. 146.)

986. In any prosecution under section 228 or under section 229 it shall be *primâ facie* evidence that a house, room or place is a disorderly house if any constable or officer authorised to enter any house, room or place is wilfully prevented from or obstructed or delayed in entering the same, or any part thereof; and if any house, room or place is found fitted or provided with any means or contrivance for unlawful gaming or betting or for opium smoking or inhaling, or with any device for concealing, removing or destroying such means or contrivance it shall be *primâ facie* evidence that such house, room or place is a common gaming-house, common betting-house or opium joint as the means or contrivance may indicate.

(This section is substituted by 3 & 4 Geo. V. ch. 13, sec. 29, for sec. 986 as it appears in R.S.C. 1906, ch. 146.)

June 7. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and KELLY, J.

*E. F. B. Johnston*, K.C., for the defendant, argued that the conviction could not be supported on the evidence, as there was no element of uncertainty about the action of the machine, which was automatic. There was no evidence that it was used by any one but the detective, or that it would work at all. [MEREDITH, C.J.O., referred in this connection to sec. 986 of the Criminal Code.] No preference is given to the person taking a throw,

as he has no right to a second throw superior to the right of anybody else. The Court cannot connect simultaneous innocent acts so as to constitute a crime. The element of chance must be in the act itself: *Rex v. Langlois* (1914), 23 Can. Crim. Cas. 43, where reference is made to *Rex v. Fortier* (1903), 7 Can. Crim. Cas. 417, *per* Wurtele, J., at p. 423; *Regina v. Jamieson* (1884), 7 O.R. 149, *per* Rose, J., at p. 153; Bishop on Statutory Crimes, para. 861. The only case against us is *Rex v. Stubbs* (1915), 24 Can. Crim. Cas. 60, 63, 31 W.L.R. 109, a decision of Stuart, J.,\* but that was a different case, as is shewn by the evidence before the magistrate, referred to at p. 63. This is not a game of chance or a matter of gain. [MEREDITH, C.J.O.:—Is not the onus on the defendant to shew that the machine was there for an innocent purpose?] The machine was not in charge of the defendant, but in that of Fisher, the owner, who had the key and redeemed the checks. There is no evidence of resorting. [MEREDITH, C.J.O., thought that was answered by the language of sec. 986.] The defendant got no advantage from the operation of the machine.

*J. R. Cartwright*, K.C., and *Edward Bayly*, K.C., for the Crown, argued that the *Langlois* case was quite different from the case at bar, and relied on the judgment of Stuart, J., in the *Stubbs* case.

*Johnston*, in reply, referred to *The Queen v. Brown*, [1895] 1 Q.B. 119.

October 12. The judgment of the Court was delivered by MAGEE, J.A.:—Reserved case stated by the Deputy Police Magistrate for Ottawa, on a conviction for unlawfully keeping a disorderly house, that is to say, a common gaming-house, *contra formam statuti*. He asks whether there was any evidence that the offence charged had been committed.

The accused, a tobacconist, kept in his shop a machine known as "Mills Counter O.K. Vendor." Any one depositing an American nickel 5-cent coin in a slot therein, would, on pulling a lever, receive out of the machine a package of chewing-gum and also so many, if any, brass tokens called premium-checks as

\*Reversed (Harvey, C.J., dissenting), 31 W.L.R. 567.



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were indicated upon the machine before he deposited the coin. Each token would entitle him to get goods in the shop to the extent of 5 cents. The indicator might shew that he would not receive any token, or it might shew any one of the 19 numbers from 2 to 20 inclusive.

So far there would be certainty and no gaming, but that was not all. The indication was made by means of designs upon the edges of three wheels inside the machine passing close to a narrow opening or slit which allowed one design on each wheel to be seen at a time, thus making a combination of three designs. The combinations would change with the turning of the wheels, which did not all turn in the same direction. A chart shewed the value of each combination in tokens, whether none or 2 or more up to 20. It is not clear whether the values of the combinations remained the same or were liable to change with the contemporaneous turning of a fourth wheel opposite to an opening in the chart. By the pulling of the lever after depositing the coin the wheels were set in motion, and on their stopping a new combination would be shewn with its value in tokens to be received by the depositor of the next coin or token. Instead of a coin, one of the tokens might be deposited with the like results except that no gum would be received.

What this next combination would be the depositor had no means of knowing beforehand. But, so far as appears, he was not limited to one or any number of operations. The very object of the tokens was that he could not be so limited. He being at the machine, no one other than the proprietor, and ordinarily not even he, would have a right to make him stand aside and take from him the opportunity to receive, for another coin or token, the value of the combination which his pulling of the lever had caused to appear. Hence for his previous deposit of 5 cents he would, in addition to the gum and tokens, if any, which he knew himself entitled to, have the chance of getting, for another 5 cents or its equivalent token, goods to the value of 10 cents or more up to \$1, with other successive chances from new combinations. In other words, he would by his original coin purchase the opportunity of winning one of 19 prizes,

worth from 5 up to 95 cents, or one of an unknown number of blanks, with such further opportunities as the new turns of the indicator might again disclose.

It needs only to state the transaction to realise that each depositor was taking part in a game of chance. It is true that he need not again pull the lever nor avail himself of good fortune if it offered, but that may be said of the winner of any gaming stake or lottery prize. It may also be that the proprietor of the machine, knows exactly how many blanks there are to the prizes, or how often, or even in what order, the different combinations will or can appear, or it may be that there is a fixed order. But, even if that were shewn to be so, the whole operation is still one of pure chance, so far as the depositors are concerned, with no element of skill.

There is no evidence as to the value of the gum (which in *Rex v. Stubbs*, 31 W.L.R. 109, 567, was stated to be one cent); but, if there was no profit on supplying a package for 5 cents, then the amount of the prizes must have been supplied at a loss to those controlling the machine. If there was a profit, then the prizes were really contributed by the depositors. In either case, there was a loss to counterbalance the winning—and both brought about by chance.

The accused had admitted to one witness that he had given tobacco for the premium checks or tokens, and to the same witness "the lady in charge of the shop and a barber in the shop there" explained the working of the machine. Another witness sent by the police had been furnished in the shop with a "nickel" in change for his money, and had put it in the slot and obtained gum, but did not look to see nor did he understand what the next combination indicated. The accused, on being asked for the keys of the machine, said that one "Fisher, the agent of the machine," had them, and he also said that "there was money in the machine, part of which he was entitled to, and that this money was to even up him for the goods which he gave in exchange for the trading-checks won by the player." In the machine were found "a number of American nickels, packets of gum, and trade-checks," meaning apparently premium-checks.

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Section 986 of the Criminal Code, 1906 (as enacted in 1913 by 3 & 4 Geo. V. ch. 13, sec. 29), makes the keeping of any means or contrivance for unlawful gaming *prima facie* evidence of a disorderly house, in prosecutions under sec. 228, which, in sub-sec. 1, fixes the punishment for keeping a disorderly house, that is to say, *inter alia*, a common gaming-house as defined by sec. 226, and in sub-sec. 2 (as enacted in 1913 by ch. 13, sec. 10) declares who shall be deemed a keeper. There was, therefore, sufficient evidence that the accused was the keeper of the premises, and indeed interested in the operation of the machine.

This machine is said and would appear to be the same sort as those which were in question in *Rex v. Langlois*, 23 Can. Crim. Cas. 43, and *Rex v. Stubbs*, 31 W.L.R. 109, 567, in both of which cases it was held not to be a breach of the statute.

In *Rex v. Langlois*, an application for leave to present a bill to the grand jury at the Sessions of the Peace, after dismissal of the charge on a preliminary inquiry, was refused by the presiding Judge, who did not believe that such a thing was what the law had qualified as gambling, and said that the player could not lose more than the profits he had realised, and might play day and night without being at a loss, and that gambling was in no way the source of profit, and the only profits came from the sale of the gum, which were divided between the company and the tobacconist. Apparently, he must have been satisfied that there were no profits on tobacco given for the checks, and he said that by what had been proved the chances were equal, and to justify the law to interfere there must have been an evident fraud, a game of hazard or chance which did not exist there. I should have thought it clear from the facts stated in that case that there was a game of chance; and, it being proved that the profit was made upon the gum, the machine was kept for gain, and so came clearly within sec. 226 (a) of the Criminal Code.

In *Rex v. Stubbs*, the Appellate Division, the Chief Justice dissenting, overruled (31 W.L.R. 567) the decision of Stuart, J., 31 W.L.R. 109, refusing to quash a conviction for keeping a common gaming-house. The majority of the Court thought that these machines differed from all the slot machines and de-

vices which had been held to be games of chance, in one important particular, that they plainly informed the persons proposing to operate them, before depositing their nickels, what the result of the operation would be, that is, whether they would receive a package of chewing-gum alone, or, in addition thereto, a certain number of trade-checks, that information being given by a notice appearing on the face of the machines—while strongly inclined to the view that the machines were not designed or used merely for the purpose of vending chewing-gum, and that they were also intended as an incentive and a lure to induce persons to continue to operate them with the hope that upon some future operation they might receive something more than a package of chewing-gum. With much respect, I am unable to agree with this conclusion, as I consider that the fact was overlooked that there was not the element of certainty, except as to the minimum to be received; there was no certainty as to the maximum, as, it seems clear to me, the statement of the working of the machine at once discloses. The reasoning of Harvey, C.J., and that of Stuart, J., appear to me to be much more consistent with the plain facts.

In my opinion, therefore, the conviction should be affirmed.

*Conviction affirmed.*

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*Appeal—Finding of Fact of Trial Judge—Credibility of Witnesses—Contract—Enforcement—Consideration—Forbearance—Statute of Frauds—Variation of Judgment at Trial.*

The judgment of Boyd, C., 34 O.L.R. 93, finding an agreement between the parties, was affirmed; MEREDITH, C.J.O., and MAGEE, J.A., dissenting.

It was held by the majority, that the Court was bound by the Chancellor's conclusion upon the question of the credibility of the witnesses; that there was consideration for the defendant's agreement; and that the Statute of Frauds was not a defence to the action; but (in this respect varying the judgment of the Chancellor) that the defendant's agreement was, that on a resale he would pay the plaintiffs the excess over what the property cost him and his expenses, to the extent of the balance remaining due to the plaintiffs on their claim—not the whole surplus.

MEREDITH, C.J.O., and MAGEE, J.A., while recognising the importance to be attached to a finding of fact upon conflicting testimony by a trial Judge who has seen and heard the witnesses, and the reluctance that there always properly is in an appellate Court to reverse such a finding, were

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of opinion that the circumstances of this case were such that they were compelled to the conclusion that the finding was not warranted and should be set aside.

*Semble, per MEREDITH, C.J.O., that the agreement set up was in substance an agreement that the defendant was to be a trustee of the property for the plaintiffs, and that was an agreement which fell within the Statute of Frauds.*

APPEAL by the defendant from the judgment of BOYD, C., 34' O.L.R. 93.

June 10 and 11. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and KELLY, J.

*H. J. Scott, K.C.*, for the appellant, argued that this was a case in which an appellate Court was justified in questioning the trial Judge's finding of fact, upon the grounds referred to in *McKinnon v. Harris* (1909), 1 O.W.N. 101, 14 O.W.R. 876. The verbal bargain relied on by the plaintiffs was a most extraordinary and improbable one, now six years old, not supported by a scrap of documentary evidence, and depending upon the inconsistent statements of the plaintiff McNeil, his wife, and his solicitor. The other plaintiff, Leslie, was brought into the action unwillingly; and, on the plaintiffs' own shewing, the alleged bargain is too indefinite in its terms to be enforced by the Court. As to whether the alleged agreement was within the Statute of Frauds, reference was made to *Dale v. Hamilton* (1846), 5 Hare 369. The learned Chancellor relied on *Stuart v. Mott* (1894), 23 S.C.R. 153, 384, 388, but that case is distinguishable. [MEREDITH, C.J.O., referred to *Leslie v. Hill* (1911-13), 25 O.L.R. 144, 28 O.L.R. 48.

*R. S. Robertson*, for the plaintiffs, respondents, argued that the defendant was in close confidential relations with all the parties, and had acted in a most dishonourable manner, so that it was in his interest to get out of the transaction as soon as possible. The learned trial Judge saw the witnesses and had the best possible opportunity of forming a correct opinion as to the weight of the evidence. Under Con. Rule 732, in force at that time, the respondents had a right to make an application to have the sale declared void, both on account of the time having elapsed for the putting in of tenders, and by reason of the appellant's conduct. Reference was made to *Alliance Bank v. Broom* (1864),

34 L.J. Ch. 256. The alleged bargain was sufficiently definite in its terms. It was to give the plaintiffs an interest in the surplus proceeds of any sale, and such an agreement is not within the Statute of Frauds: *Boston v. Boston*, [1904] 1 K.B. 124; *Archibald v. McNerhanie* (1899), 29 S.C.R. 564.

[MEREDITH, C.J.O., referred to *Hoeffler v. Irwin* (1904), 8 O.L.R. 740; and GARROW, J.A., referred to *Ross v. Scott* (1874-5), 21 Gr. 391, 22 Gr. 29.]

*Scott*, in reply, argued that the evidence did not disclose any such extremely confidential relation as, according to the plaintiffs' suggestion, existed between the parties. The defendant did not agree to finance the transaction, but simply to mark the plaintiffs' cheque.

October 12. GARROW, J.A.:—Appeal by the defendant from the judgment of the Chancellor in favour of the plaintiffs: see 34 O.L.R. 93.

The plaintiffs in the action are Leslie and McNeil, contractors, of the town of St. Mary's, who on the 11th May, 1909, recovered judgment in a mechanic's lien proceeding against the Canadian Smallwares Limited, for \$2,508.44, including costs to judgment. The property subject to the lien was subsequently, after one or more abortive attempts, sold by tender, for \$2,100, to the defendant, who on the 11th October, 1909, obtained an order vesting the same in him for all the estate, right, title, and interest therein of the plaintiffs and the defendants in that proceeding.

The property was first offered for sale by auction, at which one McCrimmon bid \$2,000, but no sale was made. Next, apparently, an attempt was made to sell at private sale, which also proved abortive. The property was then finally advertised again for sale, this time by tender, in pursuance of which the defendant tendered and became the purchaser. Before the sale, and with a view to it, the plaintiffs and one Brown, who was a creditor of the debtor company for about the sum of \$200, but who had no lien, agreed that they would attempt to buy in the property and hold it for resale, with the expressed hope of realising enough to pay the plaintiffs' claim, and also after such payment paying the claim of the creditor Mr. Brown.

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In pursuance of this agreement, a maximum price in the nature of a reserved bid was fixed, namely, \$2,050, beyond which they did not intend to go. Accordingly, a tender was prepared by Mr. Ford, the plaintiffs' solicitor, and sent in to the Master, but only for \$1,650, the amount having been filled in at the last moment, after it had become apparent that Mr. McCrimmon, the former bidder had not appeared. At about the same moment the defendant appeared upon the scene. He was informed in part of what had been done, and, claiming that something crooked was going on, hurriedly prepared and submitted his tender of \$2,100.

The defendant was at that time the manager of a bank in the town of St. Mary's, at which the plaintiffs had dealings. He was also connected by marriage with the plaintiff McNeil; and, although the families afterwards fell out, they were at this time on very good terms.

The indebtedness of the plaintiffs to the bank was considerable, nearly "up to the limit," as the plaintiff McNeil himself admits. He had, he says, been previously advised by the defendant to obtain the lien and to prosecute the matter diligently so as to reduce the indebtedness to the bank as soon as possible.

Whether or not the defendant attended the sale in the interests of the bank does not appear. It is several years ago, and the exact reason may not be easy to recall. But he was there, and he was interested as described, and at the last moment put in his tender. The plaintiff McNeil and his solicitor were at the Master's office, and objected to the defendant's tender being received, contending that it was too late, and afterwards that the defendant had acted in bad faith. The learned Master, however, overruled the objection as to time, and, it is said, expressed his very natural difficulty in understanding why they wished a tender of \$1,650 to be accepted, and objected to one of \$2,100.

On the same day, on the way back to St. Mary's, Mr. Ford, the solicitor, had a conversation on the train with the defendant of a somewhat heated character, in which the defendant said, according to Mr. Ford: "I bought in the property to protect the

boys; your tender was too late." Ford said, "I have been instructed to take proceedings to set aside the sale." The defendant said: "I don't intend to make any profit out of this transaction; when I sell the property I will hand over the difference between the cost price and what I sell it for; let matters remain as they are." Ford said: "Well, if I understand you, it is this way: if proceedings are dropped, you will hand over any profits you make out of this transaction to Leslie and McNeil when you sell the property?" He said: "Yes, that is it; I have the property practically sold now."

The plaintiff McNeil said that he had an interview with the defendant at the bank next day, when this transpired: "I said, 'You have got me into a nice mess; Leslie and Brown are insisting on going along with those proceedings'" (to set aside the sale) "'and I told them to go ahead;' and he said: 'Well now, don't get in such a big hurry; I have bought this property in to protect you; if it got into the hands of these lawyers you don't know what might happen; I am a little suspicious; I suppose you would be satisfied if you got what is coming to you out of this business?' And I said I would, and he said: 'If you will have these proceedings dropped that you are going to take, when I sell my property whatever the difference is between what I get for it and what it cost me and my expenses I will hand over to you, will that satisfy you?' And I said, 'That will satisfy me,' and he said, 'Will we shake hands on it?' And I said, 'Yes'; and we stood up beside the desk and we shook hands, and I told Ford, I said, 'I think we had better drop these proceedings;'" and they were dropped.

Mr. Brown was not called, but Mr. Ford says that, when he told Brown of the defendant's offer made in the train, Brown said he would not trust to the defendant, and suggested reporting him to his head office.

Mrs. McNeil, wife of the plaintiff McNeil, said that, within about a month, as near as she could tell, after the sale, she was in the bank one day, and had a conversation with the defendant, in which he said, "I suppose you have heard that I have bought the Smallwares?" I said, "Yes." He said: "Now you keep that man of yours quiet because I did this to help the boys out."

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All these conversations were explicitly denied by the defendant. He claimed to have made the purchase solely for himself, and denied that he had ever in any way offered or agreed to share the proceeds upon a sale, with the plaintiffs or with any one else. Unfortunately for him, however, the learned Chancellor, who saw the witnesses—an advantage which we have not—did not believe the defendant, but did believe the plaintiff McNeil and his witnesses. And by that conclusion, upon the question of credibility, we are in this Court necessarily bound. There are, no doubt, weaknesses and discrepancies in the evidence, more or less cogent, which it is easy to point out: such as the circumstance that Leslie, the co-plaintiff, as he says, had never even heard of the threatened proceedings to set aside the sale to the defendant; that Mr. Ford, the solicitor, although warned by Mr. Brown that the defendant's promise could not be relied on, did not take or even advise the ordinary business precaution of having what was agreed upon put in writing; and that, although, according to the evidence of the plaintiff McNeil, the arrangement made was perfected the day after the sale to everybody's satisfaction, his wife was advised probably a month later to "keep her husband quiet," etc., as if he was still objecting. These circumstances, however, must, it is to be assumed, have been present to the mind of the learned Chancellor, and have had accorded to them their due weight in arriving at his conclusion upon the question of fact.

All that, therefore, remains is to consider: (1) the effect of the evidence, or, in other words, what is the contract thereby created; and (2) the question of the Statute of Frauds as a defence.

The learned Chancellor apparently dealt with both questions at p. 96 of 34 O.L.R., where he says: "The agreement is that, in consideration of the abandonment of the proceedings to set aside the tender, the defendant was, upon and after sale of the land, to recoup himself his outlay and pay over the residue of the proceeds of sale to the plaintiff. No land or interest in land was involved, but merely the money which would result from a sale of the land. There was no trust impressed upon the land, and the purchaser was not bound to sell at all, but, when he did

sell, his promise was, for good consideration, to pay the profits to the plaintiff. The money, doubtless, was derived from the sale of land, but the bargain was about the money alone, and may well stand outside of the Statute of Frauds. The plaintiff's right of action arose upon and after the sale at \$3,000. . . . The apparent profit was \$900, and for this the plaintiff was and is willing to accept judgment." And, if the defendant is dissatisfied, a reference is directed in which an account is to be taken of the rents and profits received, and the expenditure, with interest properly allowable; in other words, practically the account of a mortgagee in possession.

It is apparent that the only agreement made was the one made between the plaintiff McNeil and the defendant, the morning after the sale by tender; and the only value of Ford's and Mrs. McNeil's evidence is as corroboration of McNeil's evidence. And McNeil tells us that, after preliminaries, "the defendant said, '*I suppose you would be satisfied if you got what is coming to you out of this business,*' and I said I would, and he said, '*I will tell what I will do . . .*'" And upon what he told him he would do they shook hands as upon a final agreement. Nothing was expressly said about what should be done in the unexpected case of their being a surplus; no one, I dare say, then anticipated any such too fortunate result. But, in any event, it is abundantly clear, from the evidence which I have quoted, that all that was demanded by McNeil was the balance of the plaintiffs' claim in the lien proceedings, and that that was all that the defendant in any event agreed to give.

The learned Chancellor evidently regarded the surplus upon the sale for \$3,000 as if it all belonged to the plaintiffs—a view with which, for the reasons I have stated, I do not agree.

Upon the question of the Statute of Frauds as a defence, not much, I think, need be said; because, even if it was clear that the agreement offends against its provisions, the plaintiffs, upon the authorities by which we are, I think, bound, are upon the facts entitled to relief.

The case is not in principle unlike the case in our Courts of *Ross v. Scott*, 21 Gr. 391, and, on rehearing, 22 Gr. 29. The head-note in the latter report briefly expresses what was determined,

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as follows: "Where it was shewn by evidence that the defendant had agreed to attend and buy in a property, offered for sale by auction, as the agent of the plaintiff and for his benefit: *Held*, notwithstanding the Statute of Frauds had been set up as a defence and there was no writing evidencing the agreement, that the plaintiff was entitled to a decree to carry out the agreement." The decision rests upon the ground that the defendant, in denying the agreement and claiming the land as owner, had acted fraudulently.

In a later case in the English Court of Appeal, of *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, a case of high authority, the head-note (in part) even more explicitly says: "The Statute of Frauds does not prevent proof of a fraud, and it is a fraud for a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land as his own. Therefore a person claiming land conveyed to another may prove by parol evidence that it was so conveyed on trust for the claimant, and may obtain a declaration that the grantee is a trustee for him."

See also *McCormick v. Grogan* (1869), L.R. 4 H.L. 82, where the same principle was very fully discussed, although upon the facts not applied.

It does not seem to me to be of importance that in this case the agreement relied on was not made before the defendant's tender was put in. It was made while the matter was still under control and reconsideration by the Court at the instance of the plaintiffs; and it was only in consequence of and in reliance upon the agreement that the threatened attack upon the sale to the defendant was abandoned.

For these reasons, to the extent indicated, I would allow the appeal. The amount owing to the plaintiffs and for which they should have judgment may be ascertained by the Registrar. And there should, I think, be no costs of this appeal to either party.

MACLAREN, J.A., agreed with GARROW, J.A.

KELLY, J.:—This appeal is by the defendant from the judgment of the Chancellor of the 8th May, 1915. The reasons for

judgment set out the following facts: "Land covered by mechanics' liens was sold under the direction of the Court to satisfy these liens. After an abortive sale, it was again offered for sale by tender. The plaintiff, who had the conduct of the sale, put in a tender in the name of one of the subsequent lien-holders, and the defendant put in a higher, and in fact the highest, tender, at \$2,100, and was declared to be the purchaser. This defendant had been in confidential communication with the lien-holders, and so obtained the information which he used, as alleged, to their detriment, in his tender. Next day, the present plaintiff (the chief lien-holder) instructed his lawyer to take proceedings to set aside the sale upon the highest tender; and, this being communicated to the defendant, he said: 'If you drop the proceedings, when I sell the land whatever difference is between what I get for it and what I pay I'll hand over to the lien-holders.' The promise, in other words, was just this: 'Let the sale be carried out by the Court, and when I sell the property and recoup my own expenditure, I'll give the balance of the proceeds of the sale to the lien-holders.' "

Rarely is there such direct conflict in testimony as is found in this case. Three witnesses, one of whom is a practising solicitor, are directly and positively contradicted by the defendant on matters of vital importance to the issue. The learned Chancellor in his reasons says: "The result of the evidence, though contradictory, was, to my mind, abundantly clear in affirmance of the position taken by the plaintiff."

The one circumstance which more than any other is difficult to understand, if the view of the learned Chancellor is to be adopted in its entirety, is why the defendant should agree to continue a relationship to the property which under the agreement set up could in no event be of profit or gain to him, but would involve him in loss if he failed to resell at a price sufficient to repay him his outlay. It is quite within reasonable possibility, however, that, when strenuous objection developed to his having tendered, accompanied by a threat of action to set aside his tender, he may have considered it the wiser course to quiet these objections by entering into the agreement which, in my opinion, he did make, rather than run the risk of the ex-

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pense and publicity consequent upon the institution of legal proceedings, undesirable in the position he held. The course he took after the threats of action does not exclude the possibility of an intention at the outset to purchase on his own behalf, as he says he did; his change of attitude may well be accounted for by an unwillingness to be involved in a law-suit, and a desire that his superior officers in the bank should not become aware of the part he had taken in the transaction. The Chancellor seems to have thought it was of importance to the defendant that his making the tender should not then be the subject of public inquiry. True, he has denied that any such bargain was made or that anything whatever happened between him and any of the three witnesses whom he flatly contradicts, from which any deduction can be made that it was ever suggested or even contemplated that the plaintiffs were to be interested in the proceeds of the sale in the event of his reselling. That such a bargain from his standpoint is unthinkable is the position taken by his counsel; the same was urged before the trial Judge. From whatever view-point one examines it, the evidence reveals an extraordinary condition of things; but, sitting in review, it is difficult to say that the conclusion as to the credibility of the witnesses arrived at by the learned Chancellor, who had opportunities of forming an opinion which are not present to us, is not the correct one.

The evidence of the bargain which the defendant is found to have made with the plaintiff McNeil, after a careful examination, is quite susceptible of the interpretation that what McNeil desired was that the plaintiffs be protected to the full extent of their claim, and what the defendant was willing and promised to do was, as he said, "to protect the boys" (meaning the plaintiffs), which he carried out by agreeing with McNeil to give them out of the proceeds of a resale what was coming to them to the extent of any surplus remaining after recouping him his outlay; and thereupon it was agreed that the proceedings or contemplated proceedings to set aside the tender and sale should be abandoned. The reference to paying over the difference between what the defendant would get on a resale and what the property cost him and his expenses is, I think, explainable by the

fact that it does not appear to have been in contemplation of any one that there was a prospect of a sale being made which would yield a surplus over what the defendant paid and the balance coming to the plaintiffs on their claim. I am of opinion, on a consideration of the whole case, that the real intention of the defendant and McNeil was that on a resale the defendant would pay the plaintiffs the excess over what the property cost him and his expenses, up to but not exceeding the balance unpaid the plaintiffs on their claim.

Assuming, therefore, that there was a promise or agreement, and that it was based on the plaintiffs' immediate forbearance to commence or prosecute against the defendant proceedings to set aside his tender, that forbearance constituted a sufficient consideration to support the promise.

It is further objected that, even if the facts be as found, the case falls within the operation of the Statute of Frauds, in that the agreement related to or conferred an interest in land. What is contracted for is the payment of certain moneys, and not land or an interest in land, though the money arose from the sale of land. The defendant did not agree to convey the land or any part of it to the plaintiffs, but only that he would, when he sold it, pay to the plaintiffs certain moneys out of the proceeds of the sale. The agreement did not entitle the plaintiffs to interfere with the land, or to make sale of it, or to take part in or direct the sale. They could make no claim until the lands had been sold; and only when a surplus of money remained in excess of what was necessary to recoup the defendant, were they in a position to enforce their right—a right, not to the land or an interest in it, but to the moneys it was agreed they should receive. The action is not one to enforce a trust or for the performance of a contract to sell, but simply for the payment of moneys which have now reached the defendant's hands, and which he agreed to pay.

I have been unable to find any express authority holding the statute to apply unless by the terms of the contract a sale of land or some interest in land or concerning land is dealt with as a part of the contract; but there are authorities to support the

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view against the necessity of the agreement being in writing where the circumstances are such as are now before us.

The case in the Canadian Courts which has most direct bearing upon it is *Stuart v. Mott*, 23 S.C.R. 384, where it was held that a contract for a share of the proceeds (of a mine when sold) was not one for a sale of an interest in land within the Statute of Frauds. In his judgment Strong, C.J., refers to a number of cases decided by Courts in the United States in support of that view, in one of which, *Trowbridge v. Wetherbee* (1865), 93 Mass. (11 Allen) 361, which he cites with approval, it was held that a parol promise to pay to another a portion of the profits made by the promisor in a purchase and sale of real estate is not within the statute.

There are also decisions of the English Courts, which, though not treating directly of the question in the form before us, indicate the views entertained by Judges of high authority.

In *Smith v. Watson* (1824), 2 B. & C. 401, it was held that the right to share in the profits of a particular adventure did not confer any interest in the property itself, which was the subject of the adventure.

In *Boston v. Boston*, [1904] 1 K.B. 124, Mathew, J., at pp. 127 and 128, said: "In this case the contract created no obligation to acquire an interest in land, it did not affect the owner of the land mentioned, nor did it create or deal with the interest of any one in it. The contract only dealt with a sum of money which was to be applied to indemnify the husband in respect of the amount of the purchase-money if he bought the house;" and the Court held that the Statute of Frauds had no application, and dismissed the plaintiff's appeal from a judgment in favour of the defendant on his counterclaim for the purchase-money of the residue of the lease of a particular house, which he paid at his wife's request and on her verbal promise that if he would purchase she would pay to him the amount of the purchase-money.

I do not think it necessary to go beyond the reasons for judgment in *Stuart v. Mott* for sufficient authority that the present case does not fall within the Statute of Frauds.

The appeal should, to the extent I have intimated, be allowed and the judgment varied accordingly, but without costs.

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**MEREDITH, C.J.O.**:—This is an appeal by the defendant from the judgment dated the 8th May, 1915, which was directed to be entered by the Chancellor after the trial of the action before him, sitting without a jury, at Stratford, on the 4th day of that month.

The case for the respondents is based upon an alleged parol agreement that, if they would refrain from taking proceedings to set aside the appellant's purchase of the property of the Canadian Smallwares Limited, which had been sold by tender under proceedings taken by the respondents under the Mechanics and Wage-Earners Lien Act, the appellant would pay over to the respondents, as soon as he would make a sale of the property, all profits that he should make out of the property.

This alleged agreement is positively denied by the appellant, and he pleads in bar of the action the Statute of Frauds.

While I recognise the importance to be attached to a finding of fact upon conflicting testimony by a trial Judge who has seen and heard the witnesses, and the reluctance that there always properly is in an appellate Court to reverse such a finding, the circumstances of this case are such that I am compelled to the conclusion that the finding is not warranted and should be set aside.

The transaction occurred nearly six years ago, and there is not a scrap of documentary evidence to support the respondents' case. It is supported by the testimony of the respondent McNeil, of his wife, and of Mr. Ford, who was solicitor for the respondents in the mechanics' lien action.

According to the testimony of McNeil and Ford, there was much dissatisfaction on their part at the action of the appellant in tendering for the purchase of the property under circumstances which, according to their view, made it improper for him to do so, and the respondents had given instructions to Ford to take proceedings to set aside the appellant's tender.

I gather from their testimony that this was not the ground of the attack, but that they intended to ask to have the tender set



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aside because it was put in a few minutes after the time which had been fixed for receiving tenders.

McNeil testified that he informed the appellant, on the next day after the tender was put in, of the proceedings intended to be taken; that, when told this, the appellant said: "Well, now, don't get in such a big hurry. I have bought this property in to protect you;" and, on McNeil asking, "In what way is it to protect us?" the appellant replied: "If it got into the hands of those lawyers you don't know what might happen. I am a little suspicious." That McNeil then said, "I cannot see in what way it is protecting us," to which the appellant answered, "I suppose you would be satisfied if you got what was coming to you out of this business?" And to this McNeil replied that he would, and the appellant then said: "I will tell you what I will do: if you will have these proceedings dropped that you are going to take, when I sell my property whatever the difference is between what I get for it and what it has cost me, and my expenses, I will hand over to you, will that satisfy you?" To which McNeil replied that it would, and the appellant then said, "Will you shake hands on it?" to which McNeil said "Yes;" and this is the agreement on which the respondents rely.

It is to be noticed that the account which McNeil gives is not consistent in all its parts. According to it, the proposition made by the appellant was that the respondents should get what was coming to them "out of this business," while the promise finally made was that the respondents should be paid the difference between what the appellant should get for the property when he should sell it and what it had cost him, and his expenses; so that, according to McNeil's testimony, the whole difference was to be paid to the respondents, even if it exceeded the amount of their claim against the property.

Ford's testimony was that he met the appellant on the railway train, later in the day on which the tender was put in, charged him with impropriety in putting in his tender, and said that it was put in too late, and that instructions had been given to Ford to take proceedings to set the sale aside; to which the appellant replied: "You don't understand it; I don't intend to make any profit out of this transaction; when I sell the property,

I will hand over the difference between the cost price and what I sell it for; let matters remain as they are;" that Ford then said: "Well, if I understand you, it is this way, if proceedings are dropped you will hand over any profits you make out of this transaction to Leslie and McNeil when you sell the property;" to which the appellant answered, "Yes, that is it." It will be noticed that, according to this testimony also, the promise was to pay over the whole profit, whether or not it should exceed the amount of the respondents' claim.

The only other evidence given in support of the respondents' case was that of McNeil's wife, who testified that, when going out of the bank of which the appellant was the manager, on a day within a month after the tenders were put in, the appellant called her back into his office and told her that he supposed she had heard that he had bought the Smallwares, to which she answered, "Yes," that she had heard; and that he then said: "Now, you keep that man of yours quiet, because I did this to help the boys out." It would appear, according to this testimony, that she learned this for the first time, which is strange if the promise which the appellant alleges had been made to her husband, and what was said contains no indication of such a promise having been given.

It is highly improbable, I think, that a business man, as the appellant was, would have made such a bargain as the respondents set up. According to its terms, if there were any loss sustained it was to be borne by the appellant, while if there was a profit the whole of it was to go to the respondents, and that, too, though the amount should exceed what was owing to them by the Canadian Smallwares.

The only consideration for this promise suggested was the abandonment of the threatened proceedings to set aside the appellant's purchase, and it was said that fear on his part that knowledge of the transaction would come to his bank was a strong motive for his making the promise.

I cannot understand why, if it had been intended that the respondents should receive the profits on the transaction, the simple course of transferring to them the rights of the appellant as purchaser was not taken. The men who were dealing were

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business men, and the respondents had, besides, the benefit of being advised by their solicitor, Mr. Ford.

Apart from this, however, it is not without significance that the appellant was not asked to put the agreement into writing or even to write a letter confirming the verbal promise it is alleged he had made, more especially as there were doubts entertained of the appellant keeping his promise. Surely a solicitor of experience, as Mr. Ford is, if he thought that a bargain had been made, would have taken care to have the promise put into writing before abandoning the proceedings he had been instructed to take, or at least would have himself written to the appellant stating that the proceedings were being abandoned because of the promise he had made, and stating what it was.

There is still another fact that makes strongly against the respondents. The respondent Leslie never heard of the proceedings to set aside the appellant's tender until about a month before his examination for discovery, and testified that he had never any intention of bringing this action, and that he "didn't know a thing about a thing to bring an action about."

I cannot think that due weight was given by the learned Chancellor to these considerations; and, in my opinion, they render it impossible properly to find that the agreement which the respondents set up has been proved; and, with great respect, I would, on that ground, reverse the judgment and substitute for it a judgment dismissing the action.

It is unnecessary, in the view I have taken of the facts, to determine whether, if the finding of fact of the Chancellor were supported by the evidence, the Statute of Frauds would be a bar to the action.

While the decided cases make it necessary to hold that an agreement to pay over part of the profits to be realised on the sale of land is not within the statute, I am not prepared to hold that such an agreement as the respondents set up is not within it. It seems to me that it is in substance an agreement that the appellant was to be a trustee of the property for the respondents; and, if that be the case, as was conceded on the argument, the agreement falls within the statute; but if, as contended by counsel for the respondents, the agreement was to pay over all

profit that the appellant might make out of the property when a sale of it should be made, I am not prepared at present to hold that the principle of the cases to which I have referred is applicable.

I would allow the appeal with costs, and substitute for the judgment appealed from a judgment dismissing the action with costs.

MAGEE, J.A., agreed with MEREDITH, C.J.O.

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*Appeal allowed in part.*

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*Mechanics' Liens—Material-men — Conditional Sale of Materials to Contractor—Materials Affixed to Land—Right of Vendors to Rank as Lien-holders—Conditional Sales Act, R.S.O. 1914, ch. 136, sec. 9—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 16—Claim of Contractor—Extras—Finding of Fact—Appeal.*

Where the claimants of a lien upon land for materials supplied for the erection of a building, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, insist upon the terms of a conditional sale contract whereby they have a lien upon the materials until payment, they cannot rank as lien-holders and compete with others who have no right as against the materials.

The provisions of sec. 9 of the Conditional Sales Act, R.S.O. 1914, ch. 136, contrasted with the provisions of sec. 16, sub-sec. 2, of the Mechanics and Wage-Earners Lien Act.

The finding of an Official Referee disallowing the claim of lien of material-men was affirmed.

The finding of the Referee that certain work done by the contractor, for which he claimed extra payment, was included in the contract price, was also affirmed.

APPEALS by the Toronto Furnace and Crematory Company Limited, claimants, and Edward Rawlings, contractor, from the judgment of an Official Referee in a proceeding for the enforcement of mechanics' liens.

The defendant Edward Rawlings contracted in writing to build for the defendant Emma F. Storey a house to cost \$2,460. Rawlings made default in finishing the work and in payment of his sub-contractors, and Mrs. Storey, the building owner, interfered and employed some of these and others to do the work.

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The findings of the learned Referee, Mr. F. J. Roche, were as follows:—

“The contract price was \$2,460, but it will cost \$75 to complete the house as agreed, so that Rawlings is entitled to \$2,385, on account of which he has been paid \$2,157, directly or indirectly, thus leaving \$228 still due and owing to him on the contract, subject, of course, to the claims of his sub-contractors.

“Under the statute, however, Mrs. Storey is liable to lien-holders to the extent of 20 per cent. of the said \$2,385, or \$477.

“I disallow *in toto* the extras claimed by Rawlings.

“I disallow the lien of the Toronto Furnace and Crematory Company Limited for \$94.

“I find John T. Herriot entitled to a lien for \$185; R. A. Rastall & Co., to a lien for \$402.80; John Hill, the plaintiff, to a lien for \$95; the Whyte Supply Company, to a lien for \$38.75; J. Owen, to a lien for \$61.82.”

The notice of appeal was, on behalf of the Toronto Furnace and Crematory Company Limited, lien-holders, and Edward Rawlings, the contractor, to set aside the judgment pronounced by the Referee, and for an order declaring that the Toronto Furnace and Crematory Company Limited were entitled to a lien under the Mechanics and Wage-Earners Lien Act against the lands of the defendant Emma F. Storey, and for an order directing payment by her of the claim for extra work done by Edward Rawlings in the sum of \$497, and for an order directing payment by the defendants of the costs, and for such further and other order as might seem meet, on the grounds following:—

1. That the learned Referee erred in his finding of law that the Toronto Furnace and Crematory Company Limited were disentitled to a lien under the Mechanics and Wage-Earners Lien Act, inasmuch as that company held a lien on the furnaces installed, under the provisions of sec. 3 of the Conditional Sales Act.

2. That the learned Referee erred in his finding of law with respect to the provisions of sub-sec. 2 of sec. 16 and sub-sec. 1 of sec. 28 of the Mechanics and Wage-Earners Lien Act.

3. That the learned Referee erred in disallowing the claim for extra work done by Edward Rawlings.

June 23. The appeals were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

*J. F. Boland*, for the appellants the Toronto Furnace and Crematory Company Limited. These appellants installed furnaces sold under a hire-receipt, and are entitled under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 28, to take additional security. A manufacturer may have a material-man's lien upon land and at the same time a contractual lien upon the goods: see *Hooven Owens & Rentschler Co. v. John Featherstone's Sons* (1901), 111 Fed. Repr. 81, and *Case Manufacturing Co. v. Smith* (1889), 40 Fed. Repr. 339.

*M. Grant*, for the lien-holders Rastall & Co., supported the appeal of Edward Rawlings, contending that, upon the evidence the amount claimed by the contractor for extra work should be allowed.

*J. M. Ferguson*, for the defendant Storey, the owner, the respondent in both appeals, supported the findings of the Referee.

October 12. The judgment of the Court was delivered by HODGINS, J.A.:—Two questions arise in this case: the right of the Toronto Furnace and Crematory Company Limited to a lien under the Mechanics and Wage-Earners Lien Act, and the right of the contractor to extra payment for work done in finding a foundation for his footings.

The claimants the Toronto Furnace and Crematory Company Limited have supplied or furnished furnaces for the house in question, but the title to the furnaces remains, as is found by the judgment, in them until payment of the price, by virtue of the Conditional Sales Act.

The rights of the parties must be governed by sec. 9 of that Act, R.S.O. 1914, ch. 136, which is as follows: "Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other incumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them."

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But for that section, the provisions of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, would apply. That statute enacts (sec. 16, sub-sec. 2) that "material" (i.e., every kind of movable property—sec. 2, sub-sec. (b)) "actually brought upon any land to be used in connection with such land for any of the purposes enumerated in section 6, shall be subject to a lien in favour of the person furnishing it until placed in the building, erection or work, and shall not be subject to execution or other process to enforce any debt other than for the purchase thereof, due by the person furnishing the same."

These two provisions make a sharp contrast between a chattel which is the subject of conditional sale whereby the property does not pass till payment, and the case of material supplied but on which the vendor is given a lien until it is affixed to the realty.

In the first case the owner must pay in order to become entitled to treat the article as part of his real estate, but in the latter case the seller forfeits his lien as soon as he allows it to lose the character of a chattel. In some of the United States, in the absence of such a provision as sec. 9, the vendor retaining the title to the property has been allowed to enforce a mechanics' lien. But that section prevents the doctrine of election by the furnishing or annexation of the chattel from prevailing, and leaves the seller who possesses a contract such as that of the claimants here, the right to retake.

That being so, it is clear that, insisting as the claimants do upon their conditional sale contract, they cannot rank as lien-holders and compete with others who have no right as against the furnaces and their appeal must be dismissed with costs.

Upon the other branch of the case, presented by Rastall & Co., who are entitled as lien-holders to assert the contractor's rights, it is impossible to disturb the finding of the Referee that the amount claimed as an extra was really part of the contract price. The agreement for the house contains the provision that the contractor will make a satisfactory job; and, as the walls were to be of a certain height from the footings, there can be no pretence that the contractor was not bound to build the footings so

as to sustain them. It was for him to stipulate how far he was bound to go down, if he desired extra payment for additional digging.

The appeal of Rastall & Co. will, therefore, be dismissed with costs.

*Appeals dismissed with costs.*

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*Promissory Note—Action by Endorsee against Maker—Defence—Agreement Evidenced by Correspondence—Sale of Goods—Renewal of Note Given for Price—Continuance of Renewals while Goods Unsold—"Bankable Paper"—Transfer of Note—Evidence of Value—Defect in Title—Notice—Neglect to Make Inquiries—Holder in Due Course.*

The defendant company, a dealer in machinery in Ontario, by correspondence with the B. company, a manufacturer in Illinois, made an arrangement by which some heaters of the B. company were sent to the defendant company in July, 1907, and a promissory note at 4 months given by the defendant company for the price. The note was marked "renewable," the arrangement being that at the end of 4 months the defendant company was to pay for the heaters sold and make a new note for the balance remaining. The note was renewed many times. The last renewal was in December, 1913, at 4 months, and was for less than half the amount of the original note. During the currency of this last renewal note, it was endorsed by the B. company to one W. and by W. to the plaintiff company; and this action was brought to recover the amount of the note, it not being paid at maturity:—

*Held* (MACLAREN, J.A., dissenting), that the correspondence shewed an out and out sale of the heaters to the defendant company, and an agreement that the B. company would accept for the price the defendant company's note at 4 months, and renew at maturity for the amount of the price of the heaters then unsold.

(2) That the agreement was for one renewal only; and the fact that the note was renewed every 4 months down to the time of the giving of the note sued on did not alter or affect the agreement as evidenced by the correspondence—the terms of it being unambiguous.

*Innes v. Munro* (1847), 1 Ex. 473, applied and followed.

(3) If, however, the B. company was bound to renew from time to time for the price of the unsold heaters, the plaintiff company was nevertheless entitled to recover, although not a holder in due course: the notes which were to be given were to be "bankable paper," and the B. company intended to discount them and use the proceeds; this was inconsistent with the idea that, if that course were taken, the bank or person who discounted them, taking them with notice of the agreement, would be bound by it to renew, and therefore in the position that nothing could be recovered unless or until the heaters should be sold—if that were the case, the notes would not be "bankable paper;" and W., to whom the note was transferred by the B. company, in satisfaction of a claim he had against that company, should be in no worse position than a banker discounting the note.

(4) That the note was endorsed to W., and by him to the plaintiff company, before its maturity, and in each case for value; neither W. nor the plain-



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tiff company had notice of the defect of title, if defect there was; and the plaintiff company was a holder in due course.

(5) That mere negligence on the part of a transferee of a bill or note to make inquiries which would have resulted in his ascertaining that the title of the transferor was defective is not enough to prevent him from being a holder in due course—the negligence must be such as to amount to his wilfully shutting his eyes.

Judgment of CLUTE, J., the trial Judge, reversed.

### ACTION upon a promissory note.

March 23 and 25. The action was tried by CLUTE, J., without a jury, at Toronto.

*Gideon Grant*, for the plaintiff company.

*G. F. Shepley*, K.C., and *G. W. Mason*, for the defendant company.

No one appeared for the Bates Machine Company, third party, against whom the pleadings had been noted closed in default of appearance and defence.

April 12. CLUTE, J.:—Action on a promissory note dated the 8th December, 1913, payable 4 months after date, to the order of the Bates Machine Company, at the Imperial Bank of Canada, Toronto, for \$840, made by the defendant company, with the following endorsements, in the order in which they appear upon the back of the note:—

“Bates Machine Co. N. O. Bates, treasurer.”

“Pay J. C. Pennoyer Company or order. Joseph Winterbotham.”

“Pay to the order of Continental and Commercial National Bank 2171 Chicago, Ill., 2171. All previous—J. C. Pennoyer Company, George I. Nervig, treasurer.”

“Pay to the order of the Royal Bank of Canada. Continental and Commercial National Bank of Chicago, Nathaniel R. Ross.” Across this endorsement is the word “cancelled.”

The note is a renewal, and arises out of an agreement entered into between the defendant company and the Bates Machine Company (third party) in 1907. This agreement is found exclusively in the correspondence between the defendant and third party, which begins on the 23rd February, 1907.

The defendant carries on business in Toronto for the sale of machinery. The Bates Machine Company is a manufacturer in Joliet, Ill. On the 23rd February, 1907, the defendant wrote the

Bates company for a 300 h.p., class A, Cookson heater, and further said in the letter: "Would you consider consigning a line of these heaters of the different sizes on consignment? We believe we could sell quite a number more in this way, if we had a lot of the different sizes in our warehouse. We would pay the freight and duty and you keep the stock and as one was sold we would pay you for it and you would replace it. If you can do this we would make up a car-load, including this 300 h.p. that we have ordered."

The Bates company replied to this letter on the 27th February in part as follows: "We note you would like us to ship you a car-load of these heaters, and if we can do so that we are to hold up this order until you specify the sizes. We have cut out all the consignment business. . . . Yet, we know you would do considerably better with the heater by having a stock for quick delivery, as this often influences the sale. We are disposed to help you out, however, if you desire us to ship you a car-load, and to this end would be willing to accept negotiable paper for the amount, at, say, 6 months, and we believe you could sell out the car-load in much less than 6 months' time."

The defendant replied to this on the 6th March: "We note your remarks *re* consignment business. Would you be willing to accept our paper for 6 months and we will pay you then for what we have sold and renew the balance for 6 months? If you are willing to do this we could put in a car-load."

The Bates company replied on the 18th March: "Do you think it would be possible to sell out a car-load of Cookson heaters in less than 6 months, and about how large a car-load are you considering?"

Nothing further appears in the correspondence until the 18th April, when the defendant again writes the Bates company, reminding them of their offer; to which, on the 22nd April, the Bates company replied: "We have not forgotten the correspondence relative to putting some of our heaters in your warehouse . . . If we had bankable paper, that we could get discounted and use the proceeds, it would help us out just the same as cash."

The defendant company wrote on the 24th April: "In reply to yours of the 22nd, we would suggest that you ship us a car-load of heaters on consignment and take our note at four months, and, at the end of that time, whatever was sold, we would give you a

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cheque for, and would renew the balance. . . . This gives you bankable paper. We would of course pay the duty and freight on the heaters; the point is to have them here in stock for quick shipment."

To this the Bates company replied on the 26th April, and, after referring to the proposal, claimed that the notes should bear interest. The defendant company, on the 29th April, refused to pay interest, stating: "We thought it was a fair division if we supplied the warehouse show-room, did the handling in and out, and paid the duty and freight, as against your carrying the goods here. We would give you our 4 months' paper and remit you at maturity for the goods sold. We could not consider paying you interest on the notes, as this would be unfair to us."

The Bates company accepted this view on the 2nd May, and agreed "that the position you take in regard to the notes bearing interest is correct . . . so your arrangement to give us a 4 months' paper and remit us at maturity for the goods sold will be satisfactory."

The car-load of heaters was shipped to the defendant company, who, on the 29th July, enclosed their note at 4 months for \$1,962, and added: "We have marked the note renewable, as it is given on the understanding that we are to pay you for the heaters sold, and renew the balance at maturity per your letter of May 2nd, 1907."

This was acknowledged on the 31st July by the Bates company, who said: "This is in accordance with our understanding that you will remit, for the heaters sold, at the end of 4 months, and make new note for the balance due, as per our letter of May 2nd, 1907."

The business was continued in pursuance of this agreement, and all heaters sold from time to time were paid for on the maturity of the current note, and renewal for the balance of the note was given by the defendant company to the Bates company. The note in question is one of these renewals. It was not disputed, and I find as a fact, that this note was not intended to be paid if the heaters were not sold; and, if one or more were sold, the proceeds were to be transmitted and a renewal note given for the balance.

The heater in question made provision for utilising the exhaust

steam in heating water for steam engines. Owing to electric power being largely used in Canada after this arrangement was made, the sales dropped off, and no sales were made between the date of the note sued on and its maturity.

Before the note fell due, the Bates company fraudulently disposed of the note; and, when the defendant company was called upon for payment by the plaintiff company, it wrote to the Bates company on the 27th April, 1914, enclosing a copy of a letter of the plaintiff's attorneys, and asking for an explanation, saying: "You are well aware, of course, that the note in this case was not to have been used in any such way, but purely an accommodation note, representing the unsold part of the consigned goods from time to time; and we therefore cannot feel that you have intentionally turned this note over to J. C. Pennoyer Company with any idea of having it presented for payment at maturity and getting into their lawyer's hands for collection, as has occurred. We shall rely upon a full explanation," etc.

To this the Bates company replied on the 29th April in part as follows: "It was necessary for us to raise considerable money a short time ago, and we sold some notes which we had in our possession, and amongst these notes was yours. We advised them the note was perfectly good, of course, in every respect, which it is, and it makes no difference what this note represents to them one way or the other. The note being entirely out of our possession, we, of course, have nothing to do with it one way or the other."

In a subsequent letter of the 4th May the Bates company said: "If you feel inclined to carry this from one Court to another, we certainly cannot prevent that; neither will it affect us one way or the other. . . . You can spend all the money you want to, and involve any amount of expense, but you know that is only adding an additional bill to pay. The ultimate result is that the innocent purchaser is protected, and you will not only be out the face of the note, but the expense you have gone to as well," etc.

Mr. O. W. Bates, general manager of the Bates Machine Company, who, since the agreement in 1907, has had charge of the entire correspondence, would appear to have perpetrated the fraud with a good deal of satisfaction.

The plaintiff's counsel on the argument withdrew his ad-

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mission made during the trial that the Bates Machine Company, in putting off the note, had committed a fraud upon the defendant.

The defence sets up the fraud, claims that the plaintiff is a mere trustee of the note for the third party, that the plaintiff is not a holder in due course, and that the plaintiff had full notice and knowledge of the facts when it received the note.

The intimate relation of Joseph Winterbotham to the Bates Machine Company, the Joseph Winterbotham & Son Company, and the plaintiff, creates a set of circumstances which, the defendant alleges, throws such suspicion upon the title of the plaintiff as imposes upon it the duty of shewing that it is not a *bonâ fide* holder for value without notice, is not a holder in due course, and is affected with a defective title to the note as it existed in the hands of the Bates Machine Company.

An examination of the relation existing between Joseph Winterbotham, through whose agency the note was obtained by the plaintiff, and these companies, is necessary.

Joseph Winterbotham, at the time the agreement was made in 1907, in pursuance of which the note in question was given, held a controlling interest in the stock of the Bates Machine Company, and continued to hold such interest, and was president of the company when the transaction originated in April and May, 1907, and remained president until the spring of 1909, if not later. At the time he ceased to be president, he exchanged his stock and took the bonds of the company, amounting to about \$160,000, for the stock, and in the fall of 1913 he still had about \$143,000 of the bonds. His statement is that there was a delay in the payment of the interest upon some of the bonds in the fall of 1913; some 34 interest coupons were unpaid. At this time he and his family controlled the stock in the Joseph Winterbotham & Son Company, and also the stock in the plaintiff company. The offices of these two companies adjoined each other; and, as he states, he is in the habit of seeing the treasurer of the plaintiff company sometimes 20 times a day; they are interlocked in their directorate, and their interests and relations are of the closest character. He states that he engaged Mr. Mott, of Boyle & Mott, who had done business for the Bates company and for himself, to go to Joliet and try to get payment for the interest

upon the 34 coupons, whose face value was \$27.50 each. Mott went with the coupons, and brought back the note in question, subject to Winterbotham's approval. Winterbotham says that he accepted the note and heard nothing of the agreement to renew. At this time there was a running account between the plaintiff company and the Joseph Winterbotham & Son Company, and a balance, it is alleged, was due from the Winterbotham company to the plaintiff company—of this there was no proof. Winterbotham says that he transferred the note to the company with instructions to credit the Joseph Winterbotham & Son Company with the amount, and that Nervig, the treasurer of the plaintiff company, agreed to do so. As a matter of fact, through, it is alleged, an oversight, he never was in fact credited with the amount of the note.

Joseph Winterbotham, judging from his appearance and evidence in the box, is a shrewd business man, who had practically the control, through himself and his family, of the Bates company, the Joseph Winterbotham & Son Company, and the plaintiff company. Having been connected with the Bates Machine Company for two years or longer, during which time the agreement giving rise to this note was in force, and when there were a number of renewals, I think it a fair inference that he had full knowledge of the original arrangement entered into and of the renewals from time to time during the period that he was president of that company; and, notwithstanding his denial, I entertain no doubt, and find as a fact, that he took the note with a knowledge of its origin and of its defective title. The solicitor who had the matter in charge had been also intimately connected with these companies; and I think it a fair inference from the facts proven that it was a scheme on the part of the plaintiff, the third party, and Winterbotham, to obtain payment from the defendant of the note in question, in disregard of the terms of the agreement under which it was given.

I do not think the plaintiff company is a holder of the note in due course, or that its title is better than that of the Bates Machine Company. The course of the transaction clearly indicates to my mind, aside from the actual notice which I think is brought home to the parties through Joseph Winterbotham, that the note was not dealt with in the ordinary way. It was not protested; notice

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was not given to the previous endorsers; the defendant was not notified by either Winterbotham or the plaintiff company when the note passed into its hands; and the fact that the note was a foreign note, made in a foreign country, and payable in a foreign city, makes it appear to me incredible that, if the transaction was an ordinary one, and the plaintiff company was a holder in due course, it would not have taken the usual course of giving notice to the defendant and of protesting the note when it was not paid, and of making a demand upon the endorsers for payment. It appears to have been the intention from the first to look only to the maker for payment. It is difficult to see why this should be if the transaction is an ordinary one. It is what was to be expected if, as I think, the whole scheme was for the purpose of compelling payment from the defendant, contrary to the agreement. The rating of the Bates company was high. Winterbotham is a man of very considerable means. Although it is pretended that a sale was in fact made to the plaintiff company, the defendant company up to the time of trial had never been credited with the amount of the note.

The coupons given for the note amounted to \$935. The face value of the note, when it was negotiated in January, was about \$825. It did not bear interest. It does not appear what was done with the balance, or whether it was in fact paid. Joseph Winterbotham swears that he thinks the balance was paid to Mott. Mott thinks the balance was adjusted by Bates with Winterbotham. Winterbotham swore that he was the purchaser of the note, acting for himself and those of his family interested in the bonds. Nervig, in an affidavit made in this action on the 21st November, 1914, swore that he was advised by his solicitor, and verily believed, that the plaintiff could not proceed to trial without the evidence of himself and one Joseph Winterbotham, "who was the party who conducted the negotiations with the Bates Machine Company when the plaintiff obtained the promissory note." The solicitor, Mott, referred to in this affidavit, did not attend the trial; but, before the case was closed, I permitted the plaintiff to have Mott brought from Chicago, which it did, and he was called as a witness, and shewn the affidavit. He said: "The affidavit is a misleading statement; I have found it out just this minute." Mott further stated that his father was a shareholder in the Bates company until 1909. He says that, at the

time he obtained the note for the coupons, Bates told him that the heaters were not selling as fast as they expected, but "they" (the defendant company) had no defence on the note. He further said that he thought the note had been protested, and was surprised to find that it had not. He said further that Winterbotham held all the bonds of the Bates Machine Company, and disposed of them in the fall of 1914. There was sufficient, I think, in what took place between Bates and Mott at the time of the transfer of the note to have put Mott upon inquiry if he were not already aware of the facts as to the circumstances under which the note was given.

According to Nervig's evidence, the alleged indebtedness for which the note was given was from the Joseph Winterbotham & Son Company to the plaintiff, and not from Joseph Winterbotham, but no sufficient evidence was given to shew the indebtedness from the Winterbotham company to the plaintiff. A trial balance was offered as evidence, but objected to; so that, as a matter of fact, up to the time of trial, no indebtedness being shewn by the Winterbotham company to the plaintiff, and no credit in fact given by the plaintiff to the Winterbotham company, it does not appear that any consideration passed from the plaintiff for the note.

In a letter from Boyle & Mott, of the 24th April, to the defendant company, it is stated that the plaintiff company is the holder of the note "without notice." Mr. Mott in his evidence offered a very lame explanation of what he meant by "without notice." He said, "I thought it was without notice of any defence," not "without notice of any defective title." He says the transaction was unusual.

Having regard to the facts and circumstances disclosed in the case, I do not think that the plaintiff company stands in a better position than the Bates Machine Company. A holder of a note in due course is one who has become the holder before it was overdue, without notice that it had been previously dishonoured, and who has taken the note in good faith and for value, and has had no notice of any defect in the title of the person who negotiated it. The title is defective when the note is obtained by fraud or other unlawful means, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud: Bills of Ex-

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change Act, R.S.C. 1906, ch. 119, sec. 56. Here there can be no doubt that the Bates Machine Company committed a fraud; and, if the plaintiff company had not actual notice, as I think it had through Winterbotham, of this defect, there was sufficient suspicion cast upon the transaction to cast upon the plaintiff company the duty of removing such suspicion and satisfying the Court that it was a holder in good faith, which it had failed to do.

In *Union Investment Co. v. Wells* (1908), 39 S.C.R. 625, Duff, J., at p. 643, says: "Given facts exciting suspicion, i.e., actual suspicion arising from facts known or believed to exist, and either an absence of inquiry or an inquiry which does not remove the suspicion, and you have a state of facts which is obviously incompatible with good faith."

As to what is good faith, Lord Herschell in *London Joint Stock Bank v. Simmons*, [1892] A.C. 201, at p. 221, says: "A person taking a negotiable instrument in good faith and for value obtains a title valid against all the world . . . the tribunal must investigate the facts for itself and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value . . . I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instrument had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry."

See also *Jameson v. Union Bank of Scotland* (1913), 109 L.T.R. 850; *Earl of Sheffield v. London Joint Stock Bank* (1888), 13 App. Cas. 333; *Swaissland v. Davidson* (1882), 3 O.R. 320, 325.

If a party suspects a fraud and does not ask as to it lest he should know it, he has sufficient notice; and notice to the endorser's agent in the transaction is notice to the endorser: *Oakeley v. Ooddeen* (1861), 2 F. & F. 656; *Sheldon v. Cox* (1764), 2 Eden 224; *Commercial Bank of Windsor v. Morrison* (1902), 32 S.C.R. 98, 105; *Pym v. Campbell* (1856), 6 E. & B. 370.

Fraud and defective title having been proven against the original holder, it was incumbent upon the plaintiff company to prove that it was a purchaser for value without notice: *Union*

*Bank of Halifax v. Indian and General Investment Trust* (1908), 40 S.C.R. 510, 520; from which it clearly appears, I think, that the onus is upon the plaintiff in this case.

"The plea of purchase for value without notice is (to quote Farwell, J., in *In re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, at p. 402), a single plea, to be proved by the person pleading it; it is not to be regarded as a plea of purchase for value, to be met by a reply of notice . . . ." This was approved in the Court of Appeal, [1906] 1 Ch. 386, at p. 404, *per* Collins, M.R.; at p. 409, *per* Romer, L.J.; and at p. 410, *per* Cozens-Hardy, L.J. See sec. 58 of the Bills of Exchange Act; Falconbridge on Banking and Bills of Exchange, 2nd ed., pp. 581-584.

As to when the knowledge of the solicitor may be imputed to the client, see *Dickson v. Winch*, [1900] 1 Ch. 736; and *Tweedale v. Tweedale* (1857), 23 Beav. 341, 345.

The conclusion at which I arrive may be shortly stated thus. The note in question was given for a particular purpose, in pursuance of the arrangement commenced in 1907 and continued down to the making of the present note. The defendant company had fully discharged its part of the agreement, and at the time the note was made did not owe the Bates Machine Company anything. In putting off the note there was a fraud committed by the Bates Machine Company upon the defendant company. The original agreement, making the putting off a fraud, was known to Joseph Winterbotham, who had the controlling interests in all three companies above named. The fraud having been established, the onus was upon the plaintiff company to prove that it was a *bond fide* holder for value without notice. Of this it has failed to satisfy the Court, the strong inference being the other way. The plaintiff company is not a holder in due course, and is in no better position than the Bates Machine Company, and is not entitled to recover upon the note sued on. Joseph Winterbotham was in fact the active mind, controlling the plaintiff company—was in constant and close touch with its management; the fraud was participated in by himself with knowledge of the original agreement; he being the directing mind in this transaction, his action was the action of the plaintiff company, and it is bound by the knowledge which he possessed: *Lennard's Carrying Co. Limited v. Asiatic Petroleum Co. Limited*, [1915] W.N. 119, [1915] A.C. 705.

The action is dismissed with costs.

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The plaintiff company appealed from the judgment of CLUTE, J.

June 22. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*E. F. B. Johnston*, K.C., for the appellant company, contended that the evidence did not warrant the conclusions of the trial Judge. He argued that there could be no constructive notice in a case of this kind; and on the question of notice referred to *Swaishand v. Davidson*, 3 O.R. 320, and *Union Investment Co. v. Wells*, 39 S.C.R. 625, at p. 642, and cases there cited.

*Gideon Grant*, on the same side, argued that there was no fraud within the meaning of secs. 56 and 58 of the Bills of Exchange Act.

*G. F. Shepley*, K.C., and *G. W. Mason*, for the defendant company, respondent, supported the findings of fact and the conclusions of the trial Judge, and referred, on the question of notice to *Union Bank of Halifax v. Indian and General Investment Trust*, 40 S.C.R. 510, at pp. 520, 521; *London Joint Stock Bank v. Simmons*, [1892] A.C. 201, at p. 221; *Jones v. Gordon* (1877), 2 App. Cas. 616, at pp. 624, 625, 628, 629; *Earl of Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333, at pp. 345, 346; *Ex p. Snowball*, *In re Douglas* (1872), L.R. 7 Ch. 534; *Lockhart v. Wilson* (1907), 39 S.C.R. 541, at pp. 556, 557.

October 12. MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 12th April, 1915, which was directed to be entered by Clute, J., after the trial of the action before him, sitting without a jury at Toronto, on the previous 23rd and 25th days of March.

The action is brought by the appellant as endorsee of a promissory note dated the 8th December, 1913, made by the respondent, payable to the order of the Bates Machine Company, and endorsed by that company in blank and by Joseph Winterbotham to the appellant.

The defence is that the note is a renewal of a previous one given to the Bates Machine Company for the price of a car-load of heaters, the property of the Bates Machine Company, which the respondent permitted to be delivered at its warehouse in Toronto, upon the terms that the respondent should endeavour to sell them and should pay that company for them the prices which had been agreed upon, but only when and as the respondent

should succeed in selling them; and that it was part of the arrangement upon which the respondent accepted the heaters and agreed to endeavour to sell them that in the meantime, and for the accommodation of the Bates Machine Company, the respondent should give to that company the respondent's promissory note at 4 months for the agreed price of the heaters, and that upon the maturity of the note, upon the respondent remitting the agreed price in respect of the heaters before then sold by the respondent, the note should be renewed for the balance for another period of 4 months, and so on from time to time until all the heaters should be sold or disposed of; and that nothing is now payable under the terms of this agreement, all the heaters that have not been paid for being still unsold and undisposed of; that the appellant is bound by the terms of this arrangement, and is not entitled to recover upon the promissory note because the appellant is not a holder of it in due course.

The arrangement under which the heaters were delivered to the respondent, and the original promissory note was given, was made by correspondence, from which the nature and effect of the agreement must be gathered.

The dealings between the Bates Machine Company and the respondent began by the respondent giving an order for one of the 300 horse power heaters, and asking if the company would consider "consigning a line of heaters" of the different sizes "on consignment" (letter of the 23rd February, 1907). To this letter the company replied on the 27th February, 1907, declining to send the heaters "on consignment," and saying that the company "had cut out all the consignment business on heaters," but that, if the respondent so desired, the company would ship to it a car-load and be willing to accept negotiable paper for the amount, at 6 months. On the 6th March following, the respondent wrote to the company asking if it would be willing to accept the respondent's "paper" for 6 months and payment at the maturity of the note for the heaters that had then been sold, and to renew for the balance at 6 months, and saying that, if the company was willing to do this, the respondent "would put in a car-load." This offer the company declined, by letter of the 15th March, saying that the terms that had been previously mentioned, "cash 60 days or 2 per cent. off in ten days," was the best the company

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could do. This letter concludes with the following passage: "Your proposition to pay for what you have sold at the end of six months and renew for the balance strikes the manager as not being much different from a consignment basis." The next letter is from the respondent to the Bates company, dated the 18th April following, saying: "You remember we suggested you putting in a line of these heaters in our warehouse on consignment, and we think it would pay you well to do it." This letter was replied to on the 22nd of the same month, and the company in its reply repeated its former statement that it had given up the consignment business on heaters, and said that it never had a consignment stock "across the border," and asked the respondent to suggest some way that would meet its wishes so that the company might ship the respondent "quite a stock of heaters." This letter concludes with the statement: "If we had bankable paper, that we could get discounted and use the proceeds, it would help us out just the same as cash, and by you having the stock there you could turn that into money much quicker than to await delivery." In reply to this letter the respondent wrote on the 24th of the same month suggesting that the company should ship to the respondent a car-load of heaters on consignment and take its note at 4 months, at the end of which time the respondent would give a cheque for whatever had been sold and renew for the balance, which would give the company "bankable paper," and saying that the respondent would of course "pay the duty and freight on the heaters." On the 26th April, the company answered, acknowledging the respondent's offer, and saying that the notes "must bear interest in order for us to get them discounted at the bank so that we can use the paper," and adding: "We have discontinued consignment accounts of every sort, so would not bill this as a consignment account, but we trust with the arrangement as outlined we can meet your wishes and satisfy our management at the same time." On the 29th, the respondent wrote to the company, saying: "We do not understand that the intention was that we would pay interest on the note. We might just as well pay you the cash if it comes down to that. That is the real point at issue, viz., carrying the stock. We thought it was a fair division if we supplied the warehouse show-room, did the handling in and out, and paid the duty and freight, as against your carrying the goods here. We would give you our 4 months' paper and remit you at

maturity for the goods sold. We could not consider paying you interest on the notes, as this would be unfair to us." To this letter the company replied on the 2nd May abandoning its claim to interest, and saying: "So your arrangement to give us a 4 months' paper and remit us at maturity for the goods sold will be satisfactory."

The arrangement which this correspondence evidences was that under which the heaters were delivered to the respondent and the original note was given. The note was for \$1,962, and was sent to the Bates Machine Company with a letter dated the 29th July, 1907, in which the respondent says: "We have marked the note renewable, as it is given on the understanding that we are to pay you for the heaters sold and renew the balance at maturity, per your letter of May 2nd, 1907." On the 31st of the same month, the company wrote acknowledging the receipt of the note, and saying: "This is in accordance with our understanding, that you will remit for the heaters sold at the end of 4 months and make note for balance due as per our letter of May 2nd, 1907."

I am unable to draw from this correspondence the conclusion that the agreement which it evidences is one by which the respondent was merely a consignee of the heaters, holding them for the Bates company. On the contrary, it evidences, I think, an out and out sale to the respondent, and an agreement that the company will accept for the price of the heaters the respondent's promissory note at 4 months, and renew at maturity for the amount of the price of the heaters then unsold.

According to the terms of this arrangement, in my opinion, the respondent was entitled to but one renewal. There is nothing in the correspondence to indicate an agreement to renew from time to time until all the heaters should be disposed of. As I have said, it is impossible, in my judgment, to conclude from the correspondence that the respondent was a mere consignee of the heaters, holding them as the property of the Bates company, and accounting for the agreed prices only as they should be sold. The Bates company distinctly refused to send them on consignment, and reiterated their refusal when it was a second time proposed by the respondent. The payment by the respondent of the freight and duty is a circumstance strengthening the conclusion that the transaction was an out and out sale and not a shipment "on consignment."

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It is, no doubt, the fact that the promissory note was renewed every 4 months down to the time of the giving of the note sued on, but that fact cannot alter or affect the agreement as evidenced by the correspondence, if, as I think they are, the terms of it are unambiguous.

In *Innes v. Munro* (1847), 1 Ex. 473, promissory notes had been given, and the agreement was that, if the crops of estates, from the proceeds of the sale of which it was intended that the notes should be paid, should not "come forward" in time to provide for the notes, they were to be renewed for such period as might be "found necessary from the condition of the properties." The crops did not come forward, and the notes were renewed three times; and, after the maturity of the third renewal, an action was brought upon it, which was defended on the ground that the agreement was for a renewal of the notes from time to time until there should be proceeds from the estates to provide for the renewal. At the trial it was held that the agreement provided for one renewal only, and a verdict for the plaintiff was rendered. A motion for a rule nisi to set aside this verdict and enter a verdict for the defendant was refused by the Court in banc; the Court agreeing with the trial Judge that the agreement provided for one renewal only.

That case, which is treated in all the text-books as good law, is not unlike the present in the circumstance that effect was given to the agreement according to the true construction of it, although the parties had apparently acted upon the view that their bargain was that the note was to be renewed from time to time.

I am also of opinion that, if I am wrong in this view, and the Bates company was bound to renew from time to time for the price of the unsold heaters, the appellant is entitled to recover even if not a holder in due course. It is manifest from the correspondence that the notes which were to be given were to be "bankable paper," and that it was intended by the Bates company to discount them so that the company could use the proceeds of them. Surely this is inconsistent with the idea that, if that course were taken, the bank or person who discounted them, taking them with notice of the agreement, would be bound by it to renew, and therefore in the position that nothing could be recovered unless or until the heaters should be sold. If that were the case,

the notes would not be bankable paper, and practically of little or no use for the purpose for which they were given and intended to be used; and I see no reason why the company was not at perfect liberty, instead of discounting the notes and paying over the proceeds to Winterbotham in satisfaction of the company's indebtedness to him, to hand over the note to him in satisfaction of the claim he had, and was pressing, for the overdue interest on the bonds of the company which he and his relatives owned; or why, if a banker who discounted the notes would not be affected by notice of the agreement, Winterbotham should be in any worse position.

Apart from these considerations, the defence fails, I think, because the appellant is a holder in due course, even if, in the circumstances, the proper conclusion were that there was, within the meaning of the Bills of Exchange Act, a defect in the Bates company's title to the promissory note.

The note was endorsed to Winterbotham, and by him to the appellant, before its maturity, and in each case for value, and the appellant has, in my opinion, satisfactorily proved this, and that neither it nor Winterbotham had notice of the defect of title, if defect there were.

There is no reason for questioning the testimony of Winterbotham and Mott that the note was transferred by the Bates company to Winterbotham in settlement of the overdue interest on the bonds held by him and his relations. The interest had been overdue for some time, and he was pressing for payment of it, and was the more anxious to have the interest paid because he was negotiating a sale of the bonds, and, if the interest were unpaid, it would materially affect his ability to dispose of them satisfactorily. Having, so far as appears, no knowledge of the existence of the note, he sent his attorney to collect the interest on the bonds. The company was unable to pay in cash, and offered to give in payment the respondent's promissory note. This Mott took, subject to Winterbotham's acceptance of it, by whom it was accepted after he had satisfied himself of the financial standing of the respondent.

It was argued that the transaction was an unlikely one to have been entered into, but I cannot see why. In the circumstances, there was, I think, nothing strange in Winterbotham's accepting

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in payment of the interest the promissory note of a perfectly solvent company, even though it happened to have its place of business in what counsel termed a foreign country; and it was not the first time, according to the evidence, that he had taken a promissory note—not the company's—from it in payment, when the company was not in a position to pay in cash.

What is there to shew or even to suggest that Winterbotham had any knowledge or reason to suspect the existence of any agreement qualifying the obligation of the respondent which the promissory note imports? Nothing whatever, in my opinion. Winterbotham was, no doubt, president of the Bates company when the arrangement between it and the respondent was entered into, but had ceased to hold that position or to be a stockholder in the company upwards of six years before the note came into his hands. According to the uncontradicted testimony, when president, Winterbotham had nothing to do with the ordinary business of the company; and, even if he had had, I know of no reason why, from the circumstances alone, any inference can be drawn that he had knowledge of the agreement between the company and respondent, especially when that knowledge is denied by him.

It was argued, however, that Winterbotham had notice of the alleged defect through his attorney, Mott; but I am unable to accede to the argument. What was there in what took place between Bates and Mott, when the note was handed to him, to raise even a suspicion that there was any ulterior motive for the note being parted with or that there was any defect in the title of the Bates company to it? Nothing that I can see. He asked for payment of the interest, was told by Bates, the manager of the company, that the company had no money to pay, but that he had a note he could give for the coupons; that it was a note of a Canadian firm—producing the respondent's promissory note. Mott then asked him if he was sure it was all right; to which Bates replied that they (i.e., the respondent) were not selling the heaters as fast as they expected, but that they had no "defence on the note." Why should this have put Mott on inquiry? It was, I think, calculated to have the opposite effect, and would probably indicate to him at the most that on account of the slow sale the makers of the note might ask for more time to pay it.

It is now well settled that mere negligence on the part of a transferee of a bill or note to make inquiries which would have resulted in his ascertaining that the title of the transferor was defective is not enough to prevent him from being a holder in due course; but that the negligence must be such as to amount to the wilfully shutting of his eyes: Byles on Bills, 17th ed., pp. 147, 185, and cases there cited; Maclaren on Bills Notes and Cheques, pp. 29, 30, 184; *Ross v. Chandler* (1909), 19 O.L.R. 584; sec. 3 of the Bills of Exchange Act.

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It was contended that the fact that no credit was given in the appellant's books to the Winterbotham company for the note throws doubt upon the reality of the transfer to the appellant; but that was, I think, satisfactorily explained by Nervig, the appellant's treasurer, who testified that the bookkeeper was directed to give the credit, but omitted to do so through forgetfulness.

It was contended also that it was a suspicious circumstance that Winterbotham should have transferred the note to the appellant; but a satisfactory explanation of this was given by Winterbotham, who said that he transferred it because he feared that, if he retained it, and the Bates company should become bankrupt within 4 months after he had received it, the transfer would be set aside as a preferential payment.

Something was also attempted to be made of the fact that Bates was not called as a witness by the appellant. No point appears to have been made of this at the trial, although attention was called to the fact that Mott had not been called, and the trial was adjourned to enable the appellant to procure, as it did, his attendance.

Other circumstances, to which I shall afterwards refer in dealing with the reasons for judgment of the learned trial Judge, were relied upon by counsel for the respondent.

The learned trial Judge seems to have formed very early in the course of the trial a strong opinion against the appellant's case; for, during the examination of the witness Hollinrake, when the letter of the Bates company to the respondent of the 29th April, 1914, was read, the learned Judge made the observation, "It looks like an unmitigated fraud" (p. 24 of the notes of evidence, line 27).

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The learned Judge also thought it incredible that the business between the Bates company and the respondent, during the one or two years that Winterbotham was president of the company, could have been carried on without his knowing it, which I understand to mean, knowing the nature of the arrangement between them (p. 74 of the notes of evidence, lines 14 to 18 inclusive); and in his reasons for judgment he says that it is a fair inference that he had that knowledge. Why it should be thought incredible, or why such an inference should be drawn, I do not understand, especially in view of the fact that during that period Winterbotham had nothing to do with the active management of the business, and was at the company's place of business only once a year "at the inventory."

The learned Judge also drew the inference from the facts proven that "it was a scheme on the part of the plaintiff, the third party (i.e., the Bates company), and Winterbotham to obtain payment from the defendant of the note in question, in disregard of the terms of the agreement under which it was given." Whatever may be said as to the proper inference in this regard as to the Bates company, I am unable to find any evidence to warrant the conclusion that either the appellant or Winterbotham was a party to any such scheme.

Nor am I able to agree with the finding of the learned trial Judge that it was not shewn that at the time of the transfer of the note to the appellant the Winterbotham company was indebted to the appellant. He appears to have come to that conclusion because a trial balance which shewed the indebtedness was not admitted as evidence, and he apparently overlooked the fact that the indebtedness was proved by Nervig, as well as testified to by Winterbotham. Nervig's credibility was not impeached, and there is nothing which would justify the rejection of his evidence on the point.

The learned Judge also laid stress on the fact that notice of dishonour of the note was not given to the Bates company or to Winterbotham, and that no action was taken against either of them, but the maker of the note alone was proceeded against. The note, when it was about to fall due, was left by the appellant with its bankers for collection, and was sent forward by them for presentation. The failure to give notice of dishonour would

appear to have been due to the neglect of the bankers, because, according to Nervig's testimony, they were not told not to take the usual course of giving notice of dishonour if payment of the note were refused. Not having given notice of dishonour to the endorsers would appear to be a sufficient reason, if it be necessary to give a reason, for not suing them; but, apart from this consideration, the relations between the parties to which the learned Judge refers may have led the appellant to endeavour to collect from the respondent, trusting that if there should be failure to recover there would be no difficulty in adjusting matters with the endorsers.

Altogether too much is, I think, made by the learned trial Judge of the fact that in the letter of Mott's firm to the appellant of the 24th April, 1914, the writers say that "their clients are purchasers of this note for value before maturity without notice." I can see nothing strange or suspicious in this. The note had been presented for payment, and payment had been refused, and it was a most natural thing for the attorneys to say, "Whatever objection there is to paying the note, that is not a matter that affects our clients, because they are holders in due course." The note has endorsed upon it in pencil the words "payment stopped," which were probably put there by the person who presented the note at the bank at which it was payable, as a memorandum of the answer he received from the bank officer to whom it was presented, and the letter itself probably indicates this, because it is said in it that the writers are informed that, when presented, "payment was refused on account of some dispute between you and the Bates Machine Company."

The learned Judge refers to the statement, in an affidavit made by Nervig to support an application for the issue of a commission to take his evidence and that of Winterbotham in the State of Illinois, that he was advised by his solicitor and verily believed that the plaintiff could not proceed to trial without the evidence of himself "and one Joseph Winterbotham, who was the party who conducted the negotiations with the Bates Machine Company when the plaintiff obtained the promissory note." This affidavit was drawn up in the office of Mott's firm, and the suggestion of counsel for the respondent is that it indicates that the note was not, as Winterbotham and Mott testified, transferred

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by the Bates company to Winterbotham, but directly to the appellant. A slip like this in the preparation of an affidavit ought not, I think, to cause one to discredit the account given by Winterbotham and Mott of the transfer of the note to the former. It is impossible, I think, as I have already indicated, to come to the conclusion that the story told by these two men as to the circumstances under which the note came into the possession of Winterbotham is a pure fabrication; and indeed the learned Judge does not so find, nor does he indicate what bearing the affidavit had in leading him to the conclusion to which he came.

Upon the whole, I am of opinion that the onus of proving that the appellant or Winterbotham was a holder in due course was satisfied, and that the trial Judge should have so found; and I would allow the appeal with costs, reverse the judgment appealed from, and direct that judgment be entered for the appellant for the amount of the note and interest, with costs.

GARROW, MAGEE, and HODGINS, JJ.A., concurred.

MACLAREN, J.A. (dissenting):—The plaintiff, a Chicago company, appeals from a judgment of Clute, J., dismissing an action brought by it as holder of a promissory note for \$840 made by the defendant in favour of the Bates Machine Company, of Joliet, Ill., endorsed by the latter to Joseph Winterbotham, who in turn endorsed it to the plaintiff.

The defence is that the note was negotiated in fraud of the defendant, and that the plaintiff is not a holder in due course. The trial Judge found in favour of the defendant, and dismissed the action.

Early in the trial, counsel for the plaintiff admitted that the arrangement between the Bates company and the defendant was that the steam-heaters for which the original note was given were to be on consignment, a note to be given for the amount, and to be renewed every 4 months, reducing the amount by the sales meantime until the stock was all sold, the notes being in effect accommodation notes. This admission was not withdrawn, either at the trial or in the argument before us.

In his argument at the close of the trial, he withdrew a further admission he had made, viz., that the negotiation of the note by the Bates company to Winterbotham was a fraud, within the meaning of sec. 58 of the Bills of Exchange Act, so as to cast upon

the transferee the burden of proving that value had been subsequently given in good faith for the note. This latter ground was also taken before us.

In this, I think, he is clearly mistaken. By sec. 56, sub-sec. 2, of the Act, the title of a person who negotiates a bill or note in breach of faith, or under such circumstances as amount to fraud, is defective; and this note, according to all the evidence given on that point, was so negotiated. Under the facts proved and under the admission made, the payee could only have properly negotiated it subject to the right of renewal on the part of the defendant for any portion of the value of the heaters remaining unsold. Any other negotiation would be illegal and in breach of faith and a fraud of the grossest kind.

The facts are so fully and fairly set forth in the judgment appealed from that it is not necessary to go over that ground.

In the argument before us, it was but faintly urged that the plaintiff had proved that it had given value for the note to Joseph Winterbotham. Indeed, in view of the facts proved, and the very careful analysis of the evidence by the trial Judge, such a task would appear to be quite hopeless. The plaintiff says that the consideration given was that it was to give credit to J. H. Winterbotham & Sons for the proceeds of the note; but, as the note was not paid, there were no such proceeds, and no such credit or other consideration was ever given.

Reliance was placed chiefly by counsel upon the purchase of the note from the payee by Joseph Winterbotham, who, it was strongly urged, became a holder in due course. This point also has been fully dealt with by the trial Judge, and I quite agree with him in his reasoning and his conclusions, which it is not necessary to repeat.

When the Bates company and the defendant made the arrangement out of which the note in question arose, Winterbotham had a controlling interest in the company, was its president, and continued to be such for about two years thereafter. He would, therefore, no doubt, be quite familiar with its methods of doing business on the consignment and note-renewal plan, into which it entered with the defendant. His attorney and nephew, Mott, who had been also the attorney for the Bates company, and whom he sent to collect the bond coupons from the Bates company, and

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who brought back to him the note now sued upon, gives very important and illuminating evidence. He says that, when Bates offered him the note, he asked him "if it was all right, and he (Bates) said they (the defendant company) were not selling the heaters as fast as they expected to." If Mott had desired to get information about the transaction, as it was his duty to his client to do, he would have asked an explanation of the circumstances referred to by Bates, and from the facts have formed his own opinion as to whether or not the defendant had a defence on the note, instead of relying on the unprofessional opinion of Bates that there was no defence on the note. His abruptly turning the conversation, by saying that he would take the matter up with Mr. Winterbotham, is, I think, evidence that he was, as a lawyer, fully alive to the danger of getting more information about the circumstances of the difficulty over the note, and that his course was a clear illustration of what Lord Blackburn in *Jones v. Gordon*, 2 App. Cas. 616, at p. 629, describes as a dishonest refraining from inquiry.

He does not state whether or not he gave Mr. Winterbotham the information he had received from Bates; but, in my opinion, that is quite immaterial, as in the circumstances, I think, the notice to him was notice to Winterbotham and *vice versa*; and Winterbotham was legally responsible for his acts or omissions in the matter. If he did inform Winterbotham, as it was his duty to do, and was probably the case, the latter would have fully understood the situation from his knowledge of the business methods of the Bates company in their consignment and note-renewal plan, and he could not possibly with such knowledge become a holder in due course.

Under sec. 58 of the Bills of Exchange Act, it was necessary to prove that, subsequent to the fraudulent negotiation of the note by Bates, either Winterbotham or some other holder had given value for the note in good faith and without notice of the defect of title of the Bates company. This onus was upon the plaintiff: *Tatam v. Haslar* (1889), 23 Q.B.D. 345. The defendant was not required to prove that such notice had been given—it was for the plaintiff to shew that such notice had not been given. The trial Judge, who saw and heard the witnesses, and who was at liberty to draw inferences from the non-production

of Bates and from the unsatisfactory evidence of Mott and Winterbotham, has formally found that the onus has not been satisfied, and I am of the opinion that we should not disturb his finding upon the evidence.

The difficulty of unravelling the present case has been very greatly increased by the unbusinesslike methods of the plaintiff and the other interlocking companies concerned in this transaction. Not only have we three companies with interlocking directorates, with the same controlling shareholders, connected by intermarriage, with a common solicitor, and two of them with adjoining connected offices, confessedly under the direction of a single master-mind, who have all had to do with the note now in question, three of them as endorers and the fourth as the party to whom the proceeds were to be paid, and not a single entry regarding any of these transactions in any book. Further, being fully aware of the nature of the defence, the plaintiff came down to trial without a single witness who had any knowledge of the first negotiation of the note, which was the main issue between the parties. It was only when the trial Judge pointed out to the plaintiff the position in which it was, that one of the parties to that negotiation was brought from Chicago to give evidence at an adjourned sitting of the Court, and his unsatisfactory evidence was not even supported by bringing the other party to the negotiation, whom the evidence shewed to be friendly to the other parties concerned. Moreover, there is nothing in any of the four endorsements on the note to throw any light upon the nature of the transactions between them, whether they endorsed with or without recourse, or whether the note was taken in payment or only as conditional payment, or whether notice of dishonour was waived. It is significant also that the note was not protested, and that the proceedings are against the makers alone. It might almost be thought that the various parties may not have put themselves on record in any book or paper, that they might afterwards assume the position that might be considered the most advantageous—at least if such a thought had occurred to them they would naturally have taken precisely such action as has actually been taken in this matter.

In my opinion, the appeal should be dismissed.

*Appeal allowed; MACLAREN, J.A., dissenting.*

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[BOYD, C.]

## MERIDEN BRITANNIA CO. LIMITED v. WALTERS.

RE LEWIS.

*Contempt of Court—Editor of Newspaper—Motion to Commit—Comment on Matters in Question in Pending Action—Administration of Justice—Fair Trial—Failure to Shew Interference with—Dismissal of Motion—Costs.*

The power of the Court to punish for contempt is not to be exercised for the purpose of vindicating the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice. The jurisdiction, being arbitrary and unlimited, should be jealously and carefully watched, and exercised with anxiety and reluctance. The apprehension of detriment must be of a tangible character, plainly tending to obstruct or prejudice the due administration of justice in the particular case pending. Regard must be had to all the surrounding circumstances: the manner of trial, the time of publication, the causes leading to the publication, and the tenour of what is published. The jurisdiction ought not to be exercised except when there is a case made out shewing that it is probable that the publication will substantially interfere with a fair trial.

*Helmores v. Smith* (1886), 35 Ch.D. 449, 455, *In re Clements* (1877), 46 L.J. Ch. 375, 383, *Skipworth's Case* (1873), L.R. 9 Q.B. 219, 230, 235, and *In re "Finance Union"* (1895), 11 Times L.R. 167, 169, followed.

A motion by the plaintiff company to commit for contempt the editor of a newspaper for commenting, in an article therein published soon after the commencement of this action, upon the matters in question in the action, relating to municipal affairs which had previously been discussed in public, was dismissed, and with costs—the action being one which would be tried by a Judge without a jury, and the statements and comments of the newspaper being directed to the municipal electors and being such as could have no influence upon the proper conduct of the litigation and the due attainment of an impartial trial.

MOTION on behalf of the plaintiff company for an order that Jones Lewis Lewis, editor of "The Hamilton Herald," be committed to the common gaol for the county of Wentworth for a contempt of Court in publishing or writing and procuring to be published, while the proceedings in the above action were still pending, in the said "The Hamilton Herald," a newspaper published in the city of Hamilton, on the 17th September, 1915, an editorial with the heading "An Action at Law," and also certain paragraphs containing comments upon the said action, and restraining the said Lewis and the Herald Printing Company of Canada Limited, the publisher of the said newspaper, from repeating their alleged offence.

The action was brought by the plaintiff company, suing on behalf of all ratepayers on Wellington street north, in the city of Hamilton, and also on behalf of all ratepayers in the city of Hamilton except the individual defendants, against Charles S.

Walters, Mayor of the city, William Henry Cooper, a Controller, and the city corporation. The writ of summons was issued on the 16th September, 1915; the claim endorsed upon the writ was as follows: (1) for a declaration that the property-owners on Wellington street north, between King and Cannon streets, in the city of Hamilton, in front of whose property an asphalt pavement had been laid by the defendant corporation, were not liable for the amounts assessed against them for such pavement, by reason of the fact that such pavement was not constructed with proper materials, and was not of the value charged for the same by the defendant corporation; (2) for an order referring it to the Local Master at Hamilton to ascertain what, if anything, should be paid by the property-owners for such pavement, and what funds of the defendant corporation have been diverted and misappropriated in connection with the construction of such pavement, and to take an account thereof; (3) for an order that the defendant corporation recover from the original defendants damages for breach of trust in permitting the acquisition by the defendant corporation of improper materials for the said pavement, and in expending the defendant corporation's funds in purchasing such improper materials, and in constructing the said pavement therewith, such damages when recovered to be applied to the proper uses and purposes of the defendant corporation; (4) for a declaration defining the rights of the plaintiff company to obtain inspection of books and papers, the property of the defendant corporation, and information in the possession of the officers, employees, and servants of the defendant corporation, dealing with matters in respect of which the plaintiff company is called upon by the defendant corporation to pay rates and taxes; (5) for an injunction restraining the defendant corporation from levying on or seeking to collect from the plaintiff company local improvement rates charged against it in connection with the construction of the pavement.

In support of the motion was filed the affidavit of James W. Millard, the president and managing director of the plaintiff company, stating, among other things, that in the editorial article complained of there were misleading and incorrect statements as to facts involved in the action, and the writer had suppressed important and material facts; that since the 18th June, 1915, the affiant had endeavoured to obtain all the information that ap-

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peared on record in the offices of the city-hall, but had been unable to obtain necessary data which the company had a right to obtain; that the action was brought in good faith, and not for any improper purpose, but solely to obtain relief from what the affiant considered an unjust tax for a pavement constructed with stone that had been condemned by the city engineer; that the plaintiff company objected to the Herald Printing Company of Hamilton Limited and its editor, Jones Lewis Lewis, making misleading and incorrect statements as to the facts involved in the action, and suppressing important and material facts, and commenting upon the case adversely to the plaintiff company's claim and contention, until such time as the records shall have been produced and the witnesses upon both sides subjected to examination and cross-examination in open court, and asked for the protection of the Court until the trial; and that the affiant was advised and believed that the plaintiff company had a good cause of action on the merits.

Affidavits in answer, made by the said Lewis, the editor, and by John M. Harris, the president of the Herald Printing Company of Hamilton Limited, were filed: in these affidavits the affiants denied any intention to offend or interfere with the course of justice and explained the situation and the meaning of the writings complained of.

October 13. The motion was heard by BOYD, C., in the Weekly Court at Toronto.

*E. F. B. Johnston*, K.C., for the plaintiff company, the applicant.

*C. J. Holman*, K.C., and *J. A. Soule*, for the defendants and for Jones Lewis Lewis, the respondent.

October 14. BOYD, C.:—Lord Justice Bowen pithily expresses the modern view of the power exercisable by the Court by way of discipline in cases of alleged contempt of Court. It is not, he says, "to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice." *Helmore v. Smith* (1886), 35 Ch.D. 449, 455. Many of the later cases were referred to in *Guest v. Knowles, Re Robertson* (1908), 17 O.L.R. 416. Sir George Jessel's judicial admonition was, that such arbitrary and unlimited jurisdiction should be

jealously and carefully watched, and exercised with anxiety and reluctance: *In re Clements* (1877), 46 L.J.Ch. 375, 383.

The apprehension of detriment must be of a tangible character, plainly tending to obstruct or prejudice the due administration of justice in the particular case pending. Regard must be had to all the surrounding circumstances: the manner of trial, the time of publication, the causes leading to the publication, and the tenour of what is published.

This action was begun on the 16th September by writ against the Mayor of Hamilton and a City Controller in respect of the defective character of a pavement laid in front of the plaintiff's premises, claiming a declaration to that effect, and a reference to estimate damages and to ascertain what public funds have been wasted and misapplied in the undertaking, and an injunction against collection of taxes in respect of the said work. The fact of such an action having been started appeared in "The Hamilton Herald" newspaper of the 16th September. An article also on the same day appeared in "The Hamilton Spectator" intitled "The Mayor must Justify in Court." This article set forth that the plaintiff, after failing for weeks to get satisfaction from the city as to the defective pavement, had begun this action against the Mayor and the Board of Control representative on the Works Committee, and then added: "Interesting developments are promised when the case reaches the Courts." The conduct of the Mayor is commented on, and the article goes on to allege that persistent efforts had been made by the city to sidetrack an investigation. This article on the 16th September, contemporaneous with the issue of the writ, appears to have called forth a rejoinder in the "Herald" next morning, which is the article now complained of by the applicant—headed "An Action at Law." It sets out the nature of the action and says: "The facts upon which this action is based are well known, having been published and discussed some months ago." It is then set forth that while the pavement was being laid it was discovered that the stone was unsuitable. Work was stopped and proper stone procured and suitable stone substituted for what had been laid—the article goes over the various steps through which the matter had progressed in the council in order that satisfactory material should be obtained. Then it proceeds: "A reminder of these facts should

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not be necessary, and would not be but for the fact that a city newspaper, which nurses a private grudge against the Mayor, has essayed the difficult task of creating the impression that somehow or other the Mayor is personally to blame for getting the city mixed up in a law-suit over this pavement matter. 'Mayor must justify his Stand in Court' is the head-line it puts over the article describing the action taken by the Meriden company." Other unimportant comments follow on the Controller being made a defendant, and a wonder why the Chairman of the Board of Works was not made a co-defendant; and then it winds up: "Whatever may be thought of the merits of this action or the motive for instituting it, there is already evidence that attempts will be made to utilise it for the purpose of discrediting the Mayor. It is safe to predict that such attempts will be ludicrously unsuccessful."

Two isolated items in the same paper are set forth in the notice of motion as follows:—

"Mayor Walters, Controller Cooper, and the city are in the same boat, as defendants in a law-suit. Now let us hope that none of the occupants will try to rock the boat."

"And how, we wonder, has Alderman Roy managed to escape being made a defendant in that pavement law-suit? As Chairman of the Works Committee, he signed the order for the stone which, having been used in a patch of the pavement complained of and afterwards condemned, supplied an excuse for the plea that the pavement is not up to the mark. We don't say that Alderman Roy was to blame—we don't think he was. But, if he wasn't to blame, who else could have been?"

This publication, a day after the writ issued, had no reference to the outcome at the trial, which might not take place during that municipal year. The evident object was to commend the Mayor as a worthy officer of the city, and to deprecate any use being made of the charges to affect the mind and votes of the local electorate. The trial would be as of a Chancery case, and would be before a Supreme Court Judge not likely to have ever seen or heard of this by-play of the newspapers in regard to a matter of municipal administration. Long before the trial, even if the matter were to come before a jury, the article would have passed into oblivion. Nor can I read the whole of what is com-

plained of as tending in any way to interfere with the due course of judicial determination of the controversy. I am not able to conjure up even a suspicion that either of the parties will be prejudiced or benefitted before the Court by what has appeared in the public prints.

The affidavit of Lewis, the editor, has not been answered, which states, as the article on the face of it declares, that the matters of fact or of detail referred to or commented on were already well-known to the public, and had been discussed this year and last in the Hamilton papers, and had been common talk of the citizens. The newspapers have the same right as the citizens to discuss these matters of municipal administration. It is within the purview of journalism to deal with such matters, to take sides thereon, to inform and direct the local electorate; and, so long as the articles do not unduly interfere with the action of the Courts, the members of the Press have a free hand. The ground of objection in the applicant's affidavit, para. 12, is, that the article makes misleading and incorrect statements as to the facts involved in the case and suppresses important and material facts, and comments on the case adversely to the plaintiff's claim. But it is impossible, upon a summary application, to go into the question of truth or falsehood of facts and unfair comment thereon. This method of inquiry is that invoked in matters of newspaper libel, and is not pertinent to the question of whether there has been a contempt of Court in disturbing and hampering the due course of trial and the due administration of justice. The statements and comments of the newspaper are directed to municipal electors, and will have and can have no influence upon the proper conduct of the litigation and the due attainment of an impartial trial.

The words of Cottenham, L.C., quoted by Blackburn, J., in *Skipworth's Case* (1873), L.R. 9 Q.B. 219, 230, 235, are apposite: Comments in a pending case must be such as to manifest that "the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course." If the tenour of the article is such as to be likely to prejudice the proper conduct of the case, to create a feeling against the litigant, and so to affect the minds of those who may be charged with the trial, then the disciplinary power of the Court should be exercised. This arbitrary jurisdiction, from which

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there is no appeal, should be sparingly and carefully exercised. The word of caution as expressed by Wright, J., in *In re "Finance Union"* (1895), 11 Times L.R. 167, 169, is to be emphasised: "The jurisdiction . . . is special, and ought . . . not to be exercised except when there is a case made out shewing that it is probable that the publication will substantially interfere with a fair trial. . . . It is no part of the functions of the Court to see that 'reprehensible' articles are not published in the Press."

I do not suggest that the article in hand is to be called "reprehensible," and I think the affidavit of the editor in which he justifies his action is sufficient as to that aspect of the case.

I see no reason to withhold costs—to be paid by the applicant to the opponents after taxation.

The affidavits on which the motion is based appear to be filed too late; I have not dwelt on this irregularity, but, over-passing it, dispose of the application on its merits.

[NOTE: Upon the trial of the action, the state of facts disclosed was such that the plaintiff's counsel admitted that the case could not be maintained, and it was dismissed.]

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[HODGINS, J. A.]

Oct. 19.

# RE INDEPENDENT ORDER OF FORESTERS AND TOWN OF OAKVILLE.

*Assessment and Taxes—Exemption—Orphan Asylum—Assessment Act, R.S.O. 1914, ch. 195, sec. 5 (9).*

An orphan asylum and the land connected with it are exempt from taxation under sec. 5, sub-sec. 9, of the Assessment Act, R.S.O. 1914, ch. 195, notwithstanding that the orphans admitted are restricted to a certain class. The words "orphan asylum" in the sub-section do not mean a "public orphan asylum" only, nor a "charitable institution" within the meaning of such cases as *City of Bangor v. Rising Virtue Masonic Lodge* (1882), 73 Me. 428, and *Re Linen and Woollen Drapers Institution* (1887), 58 L.T.R. 953.

*Struthers v. Town of Sudbury* (1900), 27 A.R. 217, applied and followed.

CASE stated by the Judge of the County Court of the County of Halton for the opinion of a Judge of the Appellate Division of the Supreme Court of Ontario, pursuant to sec. 81 of the Assessment Act, R.S.O. 1914, ch. 195, as follows:—

1. The Independent Order of Foresters are the owners of a tract of land in the town of Oakville, comprising about 23 acres, and on this is erected a large building which was finally completed

in the spring of 1915—the land being assessed for \$9,200 and the buildings at \$48,000.

2. These premises are for the purpose of affording a home, maintenance, etc., for the orphan children of deceased members of the said Order—and in some cases for the child or children of a deceased member in good standing who was the bread-winner, the surviving parent being unable or unfit to care for such child or children.

3. This home is maintained altogether by the Independent Order of Foresters, and its doors are open only to the children of deceased members of the Order.

4. It is not carried on for profit or gain, nor is the land or any part of it occupied by a tenant or lessee.

*Question:* Is this home an institution entitled to exemption from taxation, as held by me, under the provisions of sub-sec. 9 of sec. 5 of the Assessment Act, R.S.O. 1914, ch. 195?

The question arose upon an appeal by the Independent Order of Foresters to the County Court Judge from the decision of the Court of Revision of the Town of Oakville refusing to grant the Order exemption from taxation in respect of the land and buildings referred to above.

The learned County Court Judge allowed the appeal, giving reasons as follows:—

The appellants contend they should be exempted because they are within the provisions of sub-sec. 9 of sec. 5 of the Assessment Act, R.S.O. 1914, ch. 195. Section 5 provides that all real property in Ontario shall be liable to taxation, subject to the following exemptions:— . . . “9. Every industrial farm, house of industry, house of refuge, orphan asylum, and every boys’ or girls’ or infants’ home or other charitable institution conducted on philanthropic principles and not for the purpose of profit or gain, and every house belonging to a company for the reformation of offenders, and the land belonging to or connected with the same; but not when occupied by a tenant or lessee.”

The institution in question comprises a large building and about 23 acres of land at Oakville, which are quite valuable. The land is assessed at \$9,200 and the building at \$48,000.

The purpose of the institution is to provide a home, maintenance, and training for the orphan children of deceased members

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of the Independent Order of Foresters only, and there are about 45 of such children there at the present time, and it is supported wholly by the Order.

It is admitted that it is not carried on for the purpose of profit or gain, nor is the land or any part of it occupied by a tenant or lessee.

It is clearly an "orphan asylum," and so comes squarely within the express language of the Act.

But it is contended on behalf of the municipality that it should not be exempted because it is not open to the general public—it is restricted to orphan children of deceased Foresters alone, and so is not a public but a private institution; and, taking into consideration the kind and character of the institutions with which in the sub-section it is associated, the principle of *noscitur à sociis* applies, as all these others are open to the public generally, and "orphan asylum," therefore, here means a public orphan asylum. The words "or other charitable institution" do not assist the appellants, because these must be interpreted also as meaning institutions of the class specially named, and so *public* only. Mr. Chisholm, for the respondents, further refers me to the Am. and Eng. Encyc. of Law, 2nd ed., vol. 12, p. 343 and following pages, where it is laid down that the preponderance of authority is against exempting societies where the benefits are restricted to their own members; but in some of the authorities cited it is pointed out that the statutes in the individual cases may be the determining factor in the decisions.

I think that in this case I must be guided altogether by the language of the statute. *Struthers v. Town of Sudbury* (1900), 27 A.R. 217, is an authority that a too narrow construction of the statute is not desirable, and at p. 221 Mr. Justice Osler points out that sub-sec. 9 of the Act then in force provides that "any lunatic asylum is exempt," and says that it may well be that this would include a private lunatic asylum.

In reading over all the exempting clauses of the Act, it seems clear to me that the Legislature had in view the distinction between public and private institutions whenever it thought desirable to exempt or otherwise. In sub-sec. 3, the exemption applies to—*inter alia*—"a public or separate school;" sub-sec. 5 "public hospital receiving aid under the Hospitals and Charitable

Institutions Act;" sub-sec. 12, "every public library and other public institution." This language would cut off from the privileges of the Act institutions that were of a similar but private character.

The Legislature has drawn the line in all cases in which it has seen fit to do so. Keeping all this in view, I cannot say that the expression "orphan asylum" means only a "public orphan asylum." If the Legislature had meant this, I think it would have so stated expressly, as it did in the instances cited.

The appeal, therefore, will be allowed, and the appellants' property exempted from taxation. No costs.

The case stated by the County Court Judge was referred by order in council to a Judge of the Appellate Division.

October 5. The case was heard by HODGINS, J.A.

*David Henderson*, for the town corporation, referred to *City of Bangor v. Rising Virtue Masonic Lodge* (1882), 73 Me. 428; *Re Linen and Woollen Drapers Institution* (1887), 58 L.T.R. 953; *Struthers v. Town of Sudbury*, 27 A.R. 217; Am. and Eng. Encyc. of Law, 2nd ed., vol. 12, p. 343, and cases cited.

*W. H. Hunter*, for the society.

October 19. HODGINS, J.A.:—Stated case by His Honour Judge Elliott, Judge of the County Court of the County of Halton, under the Assessment Act, R.S.O. 1914, ch. 195, sec. 81.

The statute exempts "every . . . orphan asylum," and the institution in question comes literally within those words.

I do not think that the words following, namely—"and every boys' or girls' or infants' home or other charitable institution conducted on philanthropic principles and not for the purpose of profit or gain"—indicate that the orphan asylum must be a charitable institution within the meaning of the cases cited by Mr. Henderson.

The judgment in *Struthers v. Town of Sudbury*, 27 A.R. 217, dealing with a hospital, states the principle to be applied here, and the changes in the section under consideration since that decision suggest that it has been accepted by the Legislature as correct.

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I agree with the reasoning of the learned Judge, and would answer the question in the stated case in the affirmative. Costs should follow the result.

[MIDDLETON, J.]

## RE OWEN SOUND LUMBER CO.

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Oct. 20.

*Company—Winding-up—Directors—Misfeasance—Winding-up Act, R.S.C. 1906, ch. 144, sec. 123—Scope of—Procedure—Irregularity in Election of Directors—De Facto Directors—Liability—Payment of Dividends out of Capital—Payment of Bonuses.*

The misfeasance section, 123, of the Winding-up Act, R.S.C. 1906, ch. 144, does not create liability; it relates to procedure only; the liability must be found outside of the section.

The section is wide in its application: it covers the case of a *de facto* director guilty of misfeasance while assuming to direct the affairs of a company, although there may have been irregularity in the proceedings leading to his election as director; it does not lie in his mouth to criticise the method of his appointment.

More than honesty is required of a director; reasonable intelligence and diligent attention to business are also essential.

In this case *de facto* directors were *held* liable, upon a summary application under sec. 123, in the course of the winding-up of the company, for dividends in fact paid out of capital, but not for sums paid to themselves as bonuses upon becoming sureties for advances to the company.

APPEALS by the liquidator of the company from the finding of the Local Master at Owen Sound, in a reference for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, that certain directors of the company were not liable for misfeasance in office.

September 22. The appeals were heard by MIDDLETON, J., in the Weekly Court at Toronto.

D. Robertson, K.C., and G. H. Kilmer, K.C., for the appellant.

C. A. Masten, K.C., and W. H. Wright, for Wesley Sheriff and W. H. Merritt, respondents.

C. A. Moss, for J. M. Kilbourn, respondent.

October 20. MIDDLETON, J.:—In this case the learned Master has, I think, taken an erroneous view of the situation. The mis-

feasance section of the Winding-up Act, R.S.C. 1906, ch. 144, sec. 123,\* is one which does not create liability but relates to procedure alone. For the speedy solution of all questions arising in connection with the winding-up, any director or officer of the company who has misapplied or become accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, may be compelled upon a summary application to pay any moneys for which he is liable or accountable. The liability must be found outside of the section.

Bearing in mind the scope of the section, it is quite plain that it is intended to be wide in its application; and I think the Master has erred when he has allowed those who are *de facto* directors of the company to escape liability by alleging irregularity in the proceedings of the company leading up to their election. When they assumed to exercise the fiduciary office of director, they became liable in all respects as though rightly appointed to the office. It does not lie in the mouth of one who has in fact assumed to direct the affairs of the company, and who has abused his trust and put money in his pocket, to criticise the regularity of his appointment. A narrow construction of the statute would not really avail the *de facto* director, for he would be liable in an action for any misconduct. His interest would not be in any way served by his changing the form of remedy.

Nor do I agree with the Master in all respects as to the liability of these directors. I do not think that they were guilty of intentional dishonesty. But more than honesty is required;

\*123. When in the course of the winding-up of the business of a company under this Act, it appears that any past or present director, manager, liquidator, receiver, employee or officer of such company has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such director, manager, liquidator, receiver, officer or employee, and, upon such examination, may make an order requiring him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate as the Court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication retention, misfeasance or breach of trust, as the Court thinks fit

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reasonable intelligence and diligent attention to business are also essential. No one, at any rate in view of the numerous decisions to the contrary, would expect a director of a company to be familiar with all its details; but, before paying the extraordinary dividends declared in the case of this company, the directors should at least have had proper and adequate balance-sheets; and they ought not to have divided profits not yet earned.

The whole situation is most suggestive. The large sums paid to directors for becoming sureties for advances, contemporaneously with the earning of these extraordinary profits, indicates, if not wilful blindness, at least such an absence of the exercise of any care and discretion as, in my view, to render the directors personally liable.

With reference to the sums paid as a bonus upon suretyship, I am not prepared to say that this is such a misfeasance as to create liability.

On the material before me, I am not satisfied that I can rightly ascertain the amount of dividends paid out of capital, for which alone I think a case has been made against the directors; and I therefore refer the matter back to the Master to ascertain and state for what amount the directors should be liable in respect of dividends paid out of capital; declaring for the Master's guidance that the *de facto* directors are liable in respect thereof, notwithstanding any irregularity in their election or in the proceedings of the company, and declaring that the directors are liable for dividends in fact paid out of capital. The dividends so improperly paid were those for the years 1912 and 1913.

If I am wrong, and these amounts can be ascertained on the present evidence, so as to avoid the necessity of referring the matter back, I would modify my judgment so as to fix the amount.

As success is divided, I think there should be no costs; but the liquidator should be allowed his costs out of the estate.

## [APPELLATE DIVISION.]

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Oct. 22.

## PIONEER BANK V. CANADIAN BANK OF COMMERCE.

*Guaranty—Bank—Condition Precedent to Liability—Implied Term or Condition—Sale of Goods—Bill of Exchange—Bills of Lading—Form of.*

M., in Ontario, bought, in California, two car-loads of goods, to be shipped to Ontario. The defendants, M.'s bankers in Ontario, telegraphed to the plaintiffs, the vendors' bankers in California, guaranteeing payment of drafts on M. "with bills lading attached," not exceeding a named sum, covering the two car-loads of goods, describing them. Bills of lading attached to a draft were forwarded, and the draft was refused. In the bills of lading, the vendors were named as consignees as well as consignors—"notify M." being added after the name of the vendors as consignees. On the face of the bills of lading appeared: "Deliver without bills lading on written order of (vendors') agent." In an action upon the guaranty:—

*Held*, that, as the bills of lading were attached to the draft, the condition of the guaranty was literally fulfilled; but the object of attaching the bills of lading to the draft was the security of the defendants; and there was implied in the guaranty a further condition that the bills should be such as would afford protection to the defendants.

In construing a contract, a term or condition not expressly stated may, in certain circumstances, be implied by the Court, if it is clear from the nature of the transaction that the contracting parties must have intended such a term or condition to be a part of the agreement between them. The implication is founded upon the presumed intention of the parties and upon reason.

Review of the authorities.

*The Moorcock* (1889), 14 P.D. 64, specially referred to.

And *held*, that, as the bills of lading sent did not prevent the goods being dealt with (and lawfully dealt with so far as the carrier was concerned) without the defendants' consent, they were not such bills as the defendants had a right to receive before being bound by their guaranty.

The security of the defendants would not have been increased if M. had been made consignee instead of the vendors—the clause permitting delivery without bills of lading on the mere order of the agent of the vendors remaining effective.

The bills of lading were not, according to the evidence, in the usual and necessary form.

Judgment of MEREDITH, C.J.C.P., reversed.

APPEAL by the defendants from the judgment of MEREDITH, C.J.C.P., at the trial, on the 10th June, 1915, in favour of the plaintiffs, in an action upon a bankers' guaranty given by the defendants in respect of drafts drawn on their customer J. J. McCabe by the plaintiffs, the bankers (in California) of the Mutual Orange Distributors, who forwarded, upon McCabe's order, from California, two car-loads of oranges consigned to themselves at Toronto, where McCabe lived. The bills of lading were attached to a draft upon McCabe, which he refused to accept or pay.

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October 7. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

*R. C. H. Cassels*, for the appellants. The learned trial Judge erred by confusing the rights of the parties under the contract for the purchase of oranges, namely, McCabe and the vendors of the oranges, with the rights of the parties under the guaranty, namely, the plaintiffs and the defendants. In order to comply with the guaranty, the bill of lading should have been in such form or so endorsed as to vest in McCabe or the defendants the legal right to get the goods: *Sanders Brothers v. Maclean & Co.* (1883), 11 Q.B.D. 327. The evidence shews that McCabe could not have obtained possession of the goods without the written order or endorsement of the Mutual Orange Distributors, and that the Toronto agent of that firm refused to give such order or make such endorsement. The bill of lading was attached to the draft for the protection of the defendants. But the added clause permitting delivery without bills of lading rendered the bill of lading such an one as did not prevent the goods being dealt with without the bank's consent, and so was no protection to the bank. Therefore there was a failure of consideration: *The Moorcock* (1889), 14 P.D. 64.

*D. W. Saunders*, K.C., for the plaintiffs, respondents, submitted that there was no reason why the bills of lading should have been in the name of McCabe rather than as they were. The defendants would not have been in any better position if McCabe had been named as the consignee. As to the added clause, the bill of lading was in the form ordinarily used in such transactions: *Basse and Selve v. Bank of Australasia* (1904), 20 Times L.R. 431.

*Cassels*, in reply.

October 22. The judgment of the Court was delivered by RIDDELL, J.:—The material facts are as follows. One McCabe, a fruit dealer in Toronto, was desirous of buying California oranges. He got into communication with one Hicks, a buying broker of oranges, etc., in November, 1913, who bought for him from the Mutual Orange Distributors, a California organisation, two car-loads of California oranges on cars P.F.E. 8304 and

P.F.E. 11914. Hicks telegraphed McCabe accordingly, and asked for a "bank guaranty." McCabe saw his bank, the defendants, and they telegraphed the plaintiffs, on the 21st November, 1913, thus: "We guarantee payment of drafts on J. J. McCabe with bills lading attached not exceeding in all sixteen hundred and twenty-nine 70/100 dollars covering two cars oranges containing 396 boxes each in P.F.E. 8304 and P.F.E. 11914."

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The cars had already been set "rolling" towards the east; bills of lading attached to a draft came forward, and the draft was refused. In the meantime, the agent of the consignors had changed the destination of the goods or part of them; but, when the goods arrived at Toronto, McCabe could have got them if he so desired; prices had changed, however, and he did not want the oranges.

In the bills of lading, the Mutual Orange Distributors are consignors and consignees—the latter appearing thus: "Consigned to Mutual Orange Distributors—notify J. J. McCabe" (the name being in pencil.) On the face of the bills of lading appears: "Deliver without bills lading on written order of Mutual Orange Distributors' agent."

At the trial before the Chief Justice of the Common Pleas, the learned Chief Justice seemed to treat the case largely as one between McCabe and the vendor. But, of course, it is only the banks we should consider, and our determination is only as to the obligation of the guarantors, the Canadian Bank of Commerce, upon their written agreement.

Much argument was advanced in this appeal by the Canadian Bank of Commerce that they had the right to have the bills of lading in the name of McCabe. I do not accede to that argument, in view of the object of demanding the bills of lading. I cannot see that any legal advantage would have accrued to the Canadian Bank of Commerce from McCabe being named as the consignee rather than the Mutual Orange Distributors.

But I think the effect of the added clause permitting delivery without bills of lading on the mere order of the agent of the consignors (consignees) is different.

No doubt, the "bills of lading" were attached to the draft,



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and therefore, literally, the condition was fulfilled; but "in construing a contract, a term or condition not expressly stated may, under certain circumstances, be implied by the Court, if it is clear from the nature of the transaction . . . that the contracting parties must have intended such a term or condition to be a part of the agreement between them:" Halsbury's Laws of England, vol. 7, p. 512, para. 1035; and see cases in the notes to that section.

Of course, if the document is silent, and there is no bad faith on the part of the alleged promisee, the Court will be extremely careful how it implies a term: *In re Railway and Electric Appliances Co.* (1888), 38 Ch.D. 597; *Douglas v. Baynes* (1908), 78 L.J.P.C. 13. The implication is founded on the presumed intention of the parties and upon reason: *The Moorcock*, 14 P.D. (C.A.) 64, *per* Bowen, L.J., at p. 68. And such an implication is made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have: *Lamb v. Evans*, [1893], 1 Ch. 218; see *per* Bowen, L.J., at p. 229. (The whole matter is carefully considered in para. 1035, previously cited, of Halsbury, vol. 7).

Not infrequently the implication arises from the use the promisee intends to make of something supplied. For example, in *The Moorcock*, 14 P.D. 64, the defendants, for good consideration, agreed to allow the plaintiff to discharge his vessel at their jetty, which could not be done without grounding at low tide. On the vessel grounding, it sustained damage from the uneven condition of the river-bed adjoining the jetty. Mr. Justice Butt held that, as the defendants knew that the bottom of the river must be reached by the plaintiff's vessel, they impliedly contracted that the bottom should be fit for such grounding. This was affirmed by the Court of Appeal. That case may be expressed in this way: the defendants undertook to supply a jetty which would enable the plaintiff to use it for the purpose intended without injury.

In *The Bearn*, [1906] P. 48, a railway company invited the plaintiff's vessel to use their wharf; the berth at which the vessel lay was defective from stoke-hole refuse, etc., having been thrown

into the water. Bargrave Deane, J., held the company liable, and his judgment was affirmed by the Court of Appeal.

I do not cite any more cases; many will be found in Halsbury, vol. 7, pp. 512 *sqq.*

Looking now at the transaction in question, the object of attaching the bills of lading to the draft was the security of the Bank of Commerce. This might have been effected by a bill of lading properly drawn and (or) endorsed, whereby the bank became entitled to the goods themselves—this was not asked for. Or the bill of lading sent forward might be for the protection of the bank, in that the bill of lading being in their hands no one could legally obtain possession of the goods covered by the bill of lading without the bank's consent. It seems to me clear that both banks quite understood that such a protection should be afforded by the bill of lading, and that anything, even though called a bill of lading, which did not afford that protection to the Bank of Commerce would cause "such a failure of consideration as cannot have been within the contemplation of either side:" *The Moorcock*, 14 P.D. 64, at p. 68, *per* Bowen, L.J.

Admittedly the bills of lading sent did not, as they could not, prevent the goods being dealt with (and lawfully dealt with so far as the carrier is concerned) without the bank's consent; and, therefore, in my opinion, these were not such bills of lading as the bank had a right to receive before being bound by their guaranty.

I have already said that we should not give effect to the appellants' contention that the bill of lading should have made McCabe consignee; the security of the bank would not thereby have been increased.

It was argued by the respondents that the form of bill of lading here is the usual and necessary form; if that were so, there might be some efficacy in the fact. But the evidence does not establish the fact; one witness swears that it is not the usual form, although "understandable and O.K.;" another says it is the usual form but often not used, i.e., *a* not *the* usual form. And there is no actual necessity for such a form, convenient though it may be and is.

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The conduct of the Bank of Commerce and of McCabe does not affect the legal right of the bank to insist on the strict performance of the condition precedent to their guaranty attaching.

I would allow the appeal with costs here and below.

*Appeal allowed.*

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[BRITTON, J.]

1915

Oct. 26.

RE FAULKNER LIMITED.  
CITY OF OTTAWA'S CLAIM.

*Company—Winding-up of Trading Company—Claim of City Corporation—  
Business Tax—Preferential Claim on Assets in Hands of Liquidator—  
Distress—Winding-up Act, R.S.C. 1906, ch. 144, secs. 20, 23, 84.*

The claim of a municipal corporation for taxes upon a business assessment of an incorporated trading company is to be treated by the liquidator of the company under a winding-up order as the ordinary claim of a creditor, and not as a preferential claim upon the assets of the company, the corporation not having distrained, as they might have, before the winding-up order.

*Semble*, that secs. 20, 23, and 84 of the Winding-up Act, R.S.C. 1906, ch. 144, expressly prevent a liquidator from allowing a preference or priority unless impressed upon assets before such assets were taken possession of by him.

APPEAL by the Corporation of the City of Ottawa from the ruling or decision of the Local Master at Ottawa, upon a reference for the winding-up of Faulkner Limited, an incorporated trading company, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, disallowing the claim of the appellant corporation for taxes in respect of a business assessment of the company, as a preferential claim upon the assets of the company in liquidation.

The appeal was heard by BRITTON, J., in the Weekly Court at Ottawa.

*F. B. Proctor*, for the appellant corporation.

*George D. Kelley*, for the liquidator, respondent.

October 26. BRITTON, J.:—The appeal is from the decision of the Local Master, refusing to allow the claim of the City of Ottawa for the amount of taxes upon a business assessment

against the said company, as a preferential claim upon the assets of the said company.

It was admitted upon the argument that the business tax was properly imposed. The amount of that tax was not disputed. It was also admitted that, prior to the winding-up order in reference to the said Faulkner Limited, there were goods and chattels upon the company's premises sufficient to realise the said taxes, and that some of these goods and chattels sold by the liquidator were in possession of purchasers occupying the premises and upon the premises formerly occupied by Faulkner Limited. It was admitted that the city corporation was properly a claimant for the amount mentioned, but only as an ordinary creditor, not preferred in respect to that amount. The City of Ottawa could have collected these taxes by distress and sale. See the Assessment Act, R.S.O. 1914, ch. 195, sec. 109, and its sub-sections. I do not stop to discuss or consider from what property or where situate the amount could have been or could now be levied. The city corporation did not distrain.

The Master's conclusion was arrived at, by analogy, from the decisions with regard to the right to preference as to rent. Before the statutory lien created in Ontario for rent, to a limited amount, due by an insolvent, the law, as laid down in *Fuches v. Hamilton Tribune Co.* (1884), 10 P.R. 409, was not questioned, viz., that a mere notice of a claim to be paid preferentially for rents was not sufficient, and that even an undertaking by a provisional liquidator to pay such a claim, without the permission of the Court, could not be enforced.

*Re Fashion Shop Co.* (1915), 33 O.L.R. 253, decided that where, before the assets of the debtor were taken possession of by the liquidator, these assets had been taken possession of by an assignee, who, by reason of the Ontario Act, was bound to recognise the priority of the landlord, and the winding-up order was subsequently made, the assets became vested in the liquidator, subject to the preferential lien of the landlord for the limited amount of rent: Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38.

In reference to the landlord's priority, there was at first the necessity for distress or distraining. Then preference was given

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by legislation—as to Ontario—and as to assets in the hands of an assignee for the benefit of creditors; but preference has not yet been given by legislation in winding-up proceedings under the Dominion Act; but, on the contrary, secs. 20, 23, and 84\* seem expressly to prevent a liquidator from allowing a preference or priority unless impressed upon assets before such assets were taken possession of by him.

*In re Ottawa Porcelain and Carbon Co. Limited* (1900), 31 O.R. 679, was referred to. That case depended somewhat upon the power to impose water rates and to collect those rates, and to make those rates a lien upon the property. It does not assist much in disposing of the case in hand, but it is to be noted that the claim was filed only as the claim of an ordinary creditor.

The appeal will be dismissed with costs.

\*These sections of the Winding-up Act, R.S.C., 1906, ch. 144, are as follows:—

20. The company, from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof; but the corporate state and all the corporate powers of the company, notwithstanding it is otherwise provided by the Act, charter or instrument of incorporation, shall continue until the affairs of the company are wound up.

23. Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void.

84. No lien or privilege upon either the real or personal property of the company shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company.

2. No lien, claim or privilege shall be created upon the real or personal property of the company, or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute of judgment, or by the issue or making of any attachment or garnishee order or other process or proceeding, if, before the payment over to the plaintiff of the moneys actually levied, paid or received under such writ, memorial, minute, attachment, garnishee order or other process or proceeding, the winding-up of the business of the company has commenced: provided that this section shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the Province in which such writ, attachment, garnishee order or other process or proceeding was issued.

## [APPELLATE DIVISION.]

## REX v. SPERA.

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Oct. 25

*Criminal Law—Indictment for Seduction of Girl under 21—Criminal Code, sec. 212—Proof of Age—Best Evidence not Obtainable—Hearsay Testimony—Admissibility—Effect of sec. 984.*

Upon indictment of the prisoner, under sec. 212 of the Criminal Code, for an offence committed upon a woman under twenty-one, it was held, that, the woman's mother being dead, the evidence of herself and of a woman with whom she had gone to live when quite young, was admissible to prove her age.

*Regina v. Coz*, [1898] 1 Q.B. 179, followed.

The omission to include sec. 212 of the Code in the provision (sec. 984) which makes it competent for the Judge or jury to form their own conclusions as to the age of a person from his appearance, has not the effect of rendering this class of evidence inadmissible.

THE following case was reserved and stated, under sec. 1014 of the Criminal Code, by the Judge of the County Court of the County of Wentworth:—

“On the 6th July, 1915, Lorne Spera was brought up for summary trial before me at the weekly sittings of the Criminal Court for the County of Wentworth, upon the following indictment, namely, ‘that he did, within one year last past, at the township of Saltfleet, in the said county, then being above the age of twenty-one years, unlawfully, under promise of marriage, seduce and have illicit connection with one Nellie Gibson, an unmarried female of previously chaste character, who was then under twenty-one years of age.’

“The said Lorne Spera was convicted by me of the said offence charged, and judgment on the said conviction was postponed until the question hereinafter stated should be decided.

“The question reserved for the consideration of the Court is: Was I right in holding, upon the evidence and proceedings, a copy of which is attached as part of the case, that the said Nellie Gibson was proven to be under twenty-one years of age at the time of the seduction?”

October 25. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

*E. F. B. Johnston*, K.C., for the defendant, argued that neither the evidence of the girl herself nor that of Mrs. Coleman,

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with whom she lived, was admissible to prove the girl's age, as both classes of evidence were mere hearsay. He referred to *Horn v. Noel* (1807), 1 Camp. 61; *Regina v. Althausen* (1893), 17 Cox C.C. 630; *Regina v. Smith* (1857), 14 U.C.R. 565; *Regina v. Walker* (1844), 1 Cox C.C. 99. He also contended that, if this class of evidence were admissible, sec. 212 of the Criminal Code would have been mentioned in sec. 984, which provides that the Judge or jury may in certain cases infer a person's age from his appearance.

*J. R. Cartwright*, K.C., for the Crown, was not called upon.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—Case reserved by the Senior Judge of the County Court of the County of Wentworth.

The prisoner is indicted under sec. 212 of the Criminal Code for an offence committed upon a woman under the age of twenty-one; and the sole question is, whether there was any evidence to prove one of the elements necessary to constitute the offence, that is, was she under the age of twenty-one?

The evidence given was that of the girl herself, who testified that she was only nineteen years old, and gave her exact age. There was also the evidence of Mrs. Coleman, to whom the girl had gone when quite young. Mrs. Coleman deposed that she (the girl) was nineteen. There is no doubt her opinion was formed from information she had received when the girl came to her, and also from her own observation and judgment.

Mr. Johnston has cited no case in which there has been any determination against the admissibility of this evidence, at all events where, as in this case, the mother is dead. The cases that have been referred to during the course of the argument are directly against his contention. The statement of Mr. Hall in his work on the Law relating to Children, 3rd ed., p. 155, note (1), is that "in one case in the writer's recollection, where the mother was unable to be present through illness, the child was allowed by Coleridge, L.C.J., to give evidence of her own age."

Then the case to which my brother Hodgins has referred, *Regina v. Cox*, [1898] 1 Q.B. 179, is a direct authority against the contention of Mr. Johnston. There the indictment was for

wilfully and unlawfully neglecting children under the age of sixteen, contrary to the Act of 1894. The only evidence of their ages was that of two persons who said that they had seen the children and stated what they believed were their respective ages, all of them being under sixteen, and that of the mistress of a school who said that the elder children attended a public elementary school, and she believed they were within the statutory age limit. Lord Russell of Killowen, C.J., in delivering the judgment of the Court, says: "The fourth question upon which our opinion is asked is, whether there was any legal evidence of the children's age to go to the jury. Counsel for the defendant said that the only legal evidence of the age was the production of the certificate of birth, coupled with evidence of identity. There is no such statutory requirement. The fact that the child is under the age of sixteen may be proved by any lawful evidence. The evidence here is that which is stated in the third paragraph of the case. It is, in my opinion, impossible to say that there was not evidence, proper to be left to the jury, that the children were under sixteen."

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The matter has been considered in the United States in many cases, two of which I have had an opportunity of looking at: *Cheever v. Congdon* (1876), 34 Mich. 296, in which the Court overruled the objection that a witness was incompetent to prove his own age, and held that he was clearly competent: and *Loose v. The State* (1903), 120 Wis. 115, where the charge was that the prisoner had criminal knowledge of and abused a female child under the age of fourteen years, and the Court treated it as clearly settled that, having arrived at the age of discretion, the child was competent to give evidence of her age.

It is argued by Mr. Johnston that the omission to include sec. 212 of the Criminal Code in the provision which makes it competent for the Judge or jury to form their own conclusions as to the age of a person from his appearance, shews that this class of evidence is not admissible.\* That contention is, in my opinion,

\*Section 212 of the Criminal Code, R.S.C. 1906, ch. 146, provides: "Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age."

Section 984 provides: "To prove the age of a boy, girl, child or young



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not well-founded. The section does not exclude any other class of evidence that is by law admissible, but provides for another means of determining the age where other competent evidence is not obtainable.

We think the evidence was clearly admissible, and that the conviction must be affirmed.

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Oct. 28.

## [APPELLATE DIVISION.]

## HUTH V. CITY OF WINDSOR.

*Highway—Nonrepair—Cement Sidewalk in City Street—Roughened Surface Worn Smooth—Neglect to Keep Roughened—Dangerous Condition—Notice and Knowledge—Injury to Person—Reasonable Care—Municipal Act, R.S.O. 1914, ch. 192, sec. 460.*

The judgment of SUTHERLAND, J., *ante* 245, was affirmed.

APPEAL by the defendant city corporation from the judgment of SUTHERLAND, J., *ante* 245.

October 28. The appeal was heard by MEREDITH, C.J.O., GARRÖW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*F. D. Davis*, for the appellant corporation, contended that no negligence on the part of the corporation had been shewn, and cited *Crafter v. Metropolitan R.W. Co.* (1866), L.R. 1 C.P. 300, a very similar case, in support of his contention. The finding of the learned trial Judge that the sidewalk was out of repair was erroneous. The sidewalk was properly constructed and of the best materials and workmanship, and was in good condition at the time of the accident. All sidewalks of similar

person for the purposes of sections 211, 215, 242, 243, 245, 294, 301, 302, 315 and 316 any entry or record by an incorporated society or its officers having had the control or care of the boy, girl, child or young person at or about the time of the boy, girl, child or young person being brought to Canada, if such entry or record has been made before the alleged offence was committed, shall be *prima facie* evidence of such age.

2. In the absence of other evidence, or by way of corroboration of other evidence, the Judge, or, in cases where an offender is tried with a jury, the jury before whom an indictment for the offence is tried, or the Justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the boy, girl, child or young person.

material were necessarily smooth at certain times of the year. The plaintiff never notified the defendant corporation of any dangerous condition in the sidewalk, and his injuries were the result of his own want of care.

*G. A. Urquhart*, for the plaintiff, respondent, was not called upon.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The learned trial Judge, after careful consideration, came to the conclusion that the respondent's injuries were occasioned by the failure of the appellant corporation to keep in repair the sidewalk upon which the respondent fell.

This is not the ordinary case of a sidewalk constructed with a smooth surface, but there was the recognition by the appellant of the necessity of doing something to prevent just such a dangerous condition from arising, by reason of the action of the frost, as occurred. With that object in view, in constructing the sidewalk, the surface was roughened, but this roughening was allowed to wear off; and, therefore, there was removed that which the appellant recognised ought to be provided for the safety of the travelling public.

I think we may rest our judgment upon that ground, and dismiss the appeal with costs.

*Appeal dismissed.*

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[APPELLATE DIVISION.] •

BRYMER V. THOMPSON.

1915

Oct. 29.

*Landlord and Tenant—Lease of Flat in Building—Implied Stipulation to Furnish Heat—Collateral Contract—Statute of Frauds—Damages for Inadequate Heating—Reformation of Lease.*

The judgment of MIDDLETON, J., *ante* 194, was affirmed, for the reasons stated by him.

*Held*, by MEREDITH, C.J.O., that a case had been made for reformation of the plaintiff's lease.

APPEAL by the defendant from the judgment of MIDDLETON, J., *ante* 194.

October 29. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

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A. McLean Macdonell, K.C., for the appellant. The learned trial Judge erred in his finding that there existed an implied obligation on the part of the defendant to heat the premises in question adequately and sufficiently for the plaintiff's purposes. He also improperly admitted evidence varying the written contract: *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30.

G. N. Shaver, for the plaintiff, respondent, was not called upon.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appeal must be dismissed.

The learned Judge, in his reasons for judgment, cites the rule laid down in *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488, that there is a right to imply a stipulation in a written contract where, "on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist."

He also refers to another case, *Ex p. Ford* (1885), 16 Q.B.D. 305, in which Lord Esher said: "It seems to me that whenever circumstances arise in the ordinary business of life in which if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted."

Now in this case, there is not the slightest doubt that the contract was entered into upon the basis that the premises that were to be rented were to be steam-heated, and it would be nonsense, I think, to say that what the parties contemplated was that, although they were then being steam-heated, there was to be no obligation on the part of the landlord to continue to keep them so heated during the term of the lease.

I think the cases cited by the learned trial Judge in his reasons for judgment are conclusive against the contention of counsel for the appellant.

Speaking for myself, I think a case has been made for the reformation of the instrument so as to include in it a covenant on the part of the lessor that the premises shall be steam-heated

during the whole of the period for which the premises are rented. The premises were rented as steam-heated premises, and there is no doubt that that was in the minds of both parties when the lease was entered into; and if, by the terms of the contract, there is no obligation to keep the premises heated, it seems to me that the document ought to be reformed in order to make that a provision of the contract. As I have before stated, I speak only for myself in regard to the last observation.

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*Appeal dismissed with costs.*

[IN CHAMBERS.]

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Oct. 25.

RE GARNHAM'S CONVICTION.

RE RICHARDSON'S CONVICTION.

*Municipal Corporations—Hawkers and Pedlars' By-law of County—Magistrate's Conviction—Sale of Coal Oil by Travelling Salesman—Sale without Delivery—"Hawker"—Municipal Act, R.S.O. 1914, ch. 192, sec. 416—Amendment by 5 Geo. V. ch. 34, secs. 32, 33.*

To constitute an offence against a by-law of a municipality providing for the licensing, regulating, and governing of hawkers, pedlars, and petty chapmen, passed pursuant to the provision of the Municipal Act, 1903, now found in sec. 416 of the Municipal Act, R.S.O. 1914, ch. 192, and amended pursuant to the statutory amendments made by 5 Geo. V. ch. 34, secs. 32 and 33, it is not necessary that there should be a delivery, as well as a sale, of goods by the accused; and a travelling salesman making sales of coal oil by sample is a "hawker," although he does not cry his goods or carry a pack.

Where there was, clearly and expressly, a sale, plainly evidenced in writing over the signatures of the buyer and the seller's salesman, a motion to quash a magistrate's conviction for an offence against a municipal by-law such as above described, was refused.

*Rea v. St. Pierre* (1902), 4 O.L.R. 76, and *Rea v. Borrer* (1915), 9 O.W.N. 64, distinguished.

ON the 17th September, 1915, S. A. Garnham and A. E. Richardson were severally convicted before the Police Magistrate for the City of Woodstock for that they did on or about the 23rd August, 1915, at North Norwich, in the county of Oxford, unlawfully commit a breach of by-law 550 of the county of Oxford and the amendment thereto by by-law 715, by being agents for the Columbus Oil Company of Columbus, Ohio, and taking orders for coal oil in the county of Oxford without

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having first obtained licenses so to do under the provisions of the said by-law and amending by-law.

The original by-law was passed on the 5th December, 1906, and was a by-law to provide for the licensing, regulating, and governing of auctioneers, and hawkers, pedlars, or petty chapmen, within the county of Oxford. The parts of the by-law under which the convictions were made, as amended on the 11th June, 1915, provided that all hawkers should be licensed, and that the word "hawker" should include "all persons, being agents for persons not resident within the county, who sell or offer for sale . . . coal oil . . ."

Motions to quash these convictions were made by S. A. Garnham and A. E. Richardson.

Section 416 of the Municipal Act, R.S.O. 1914, ch. 192, as amended by 5 Geo. V. ch. 34, secs. 32 and 33, provides that "by-laws may be passed by the councils of counties . . . (1) for licensing, regulating and governing hawkers, pedlars and petty chapmen . . . who go from place to place or to other men's houses to take orders for coal oil or other oil which is to be delivered afterwards from a tank car moved on a railway line or who go from place to place or to a particular place to make sales or deliveries of coal oil or other oil from such tank car. . . . (e) 'Hawkers' . . . shall include agents for persons not resident within the county who sell or offer for sale tea, coffee . . . millinery, coal oil, tinware, carpet sweepers and electrical appliances, or jewellery, spectacles or eye-glasses, or who carry or expose samples or patterns of any such article which is to be afterwards delivered within the county to a person not being a wholesale or retail dealer in such article."

October 16. The motions were heard by MEREDITH, C.J. C.P., in Chambers, at the London Weekly Court sittings.

*G. S. Gibbons*, for the applicants.

*S. G. McKay*, K.C., for the complainant, respondent.

October 25. MEREDITH, C.J.C.P.:—These two motions have been argued together as if one, the facts in each being alike in all material matters: and the one question so argued was:

whether there had been in fact a sale of the oil in question. The notices of the motions seem to have been drawn under the erroneous supposition that the conviction had been made under the legislation respecting "transient traders;" instead of, as they were made, under the legislation respecting "hawkers and pedlars."

The contention made in behalf of each of the defendants was, that he merely "took orders" for coal oil, orders which their masters were not bound to fill or accept, and without which acceptance there could be no sale: and the cases were retained by me until the whole evidence could be read and considered carefully, and the facts, affecting this one point in controversy, well understood.

A careful consideration of the whole evidence now has made it quite plain that the oil in question was sold, that completed binding contracts of sale were duly entered into: and that is made more abundantly plain in the printed and written forms of the contracts entered into and signed and delivered at the time of the sale, the one containing such words as these: "Sold to Albert Stover;" "Terms cash on delivery;" "Salesman, A. E. Richardson;" and "Purchaser, Albert Stover;" and the other containing like words.

So that, beyond all question, there was, in each case, a sale of coal oil; and the law in question is expressly aimed against—among others—"all persons, being agents for persons not resident within the county, who sell or offer for sale . . . coal oil." It cannot be said that the law-makers did not mean that which is the plain meaning their words convey, for, in the first place, no Court has any power to pervert the plain meaning of words used, and, in the second place, there is no good reason for supposing that they were intended to mean something different. The kind of protection of local dealers provided for in such legislation has not ebbed, but has always flowed, since its first introduction; and, so increased, shews an intention to prevent, pretty fully, competition, by those who pay no local tax, with those who do. The other recent legislative provision against "taking orders" for coal oil to be delivered from a "tank car" does not

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militate against adjudication which takes the Legislature at its word in this respect; it rather has, in one sense, the opposite effect, it shews the perseverance of the Legislature in maintaining the kind of protection I have mentioned, and may have been meant to meet, for that purpose, the view expressed, by one Judge at least, that taking an order is not a sale. The Municipal Act is not a symmetrical and logical legal structure, it is indeed in some respects a thing of patches, frequently made, and not always made with the fullest and clearest knowledge of its need and fitness. However, in this case, there was, clearly and expressly, a sale, plainly evidenced in writing over the signatures of buyer and seller's "salesman."

Legislative definitions, and doubtless distortions, of the meaning of the word "hawkers," may lead to surprise at a holding that these salesmen were hawkers, hawkers without crying their wares or carrying their packs; but so the Legislature has declared, and so they must be treated in all things affected by such legislation: and it is nowhere said that there must be a delivery, as well as a sale, to constitute an offence against this legislation: on the contrary, merely offering for sale is an offence: see *Spanish Fork City v. Mortenson* (1890), 7 Utah 33; and *City of New Castle v. Cutler* (1901), 15 Penn. Super. Ct. 612.

The case of *Rex v. St. Pierre* (1902), 4 O.L.R. 76, was a case under the transient traders, not, as this case is, under the hawkers and pedlars, clauses of the Municipal Act; it has no bearing upon this case.

In the case of *Rex v. Borrer* (1915), 9 O.W.N. 64, it was held that another servant of the masters of the applicants in these cases—the Columbus Oil Company—was not guilty of an infraction of the law in question in these cases, because he merely delivered the oil that a "salesman" of the company had sold; and so, if these applications were to succeed, any person could drive a coach and four through this legislation, by the simple course of having different servants enter into and carry out different parts of the transaction. Although that case seems to have been one of a conviction under the transient traders clauses of the

Municipal Act, the learned Judge who decided it seems plainly to have been of opinion that, if the servant of the company, who was prosecuted in that case, had done what those servants of the company who were convicted in this case did, he would have been properly convicted notwithstanding the case of *Rex v. St. Pierre*; or the case of *Rex v. Pember* (1912), 3 O.W.N. 1216.

These applications must, therefore, be dismissed; and dismissed with costs, if the respondent asks for costs.

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[Leave to appeal from the orders of MEREDITH, C.J.C.P., refusing to quash the convictions, was granted by SUTHERLAND, J., in Chambers, on the 8th November, 1915.]

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[IN CHAMBERS.]

LUCZYCKI V. SPANISH RIVER PULP AND PAPER MILLS CO.

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July 19.  
Nov. 4.

*Alien Enemy—Action for Tort Begun before War—Motion to Dismiss after Hostilities Commenced—Plaintiff Resident in Enemy Country—Security for Costs—Stay of Proceedings until after Restoration of Peace—Judicature Act, sec. 16(f)—Practice—Order not Necessary while Plaintiff Quiescent.*

The plaintiff, a subject of the Emperor of Austro-Hungary, and resident in Galicia, began this action—in tort, under the Fatal Accidents Act—in 1913, and paid money into Court as security for costs. The action was pending and undisposed of when war was declared in August, 1914:—*Held*, that the action should not be dismissed, but merely stayed until after the restoration of peace; and it was not necessary to issue an order staying proceedings so long as the plaintiff remained quiescent. The earlier cases shew that the fact of the plaintiff becoming during action an alien enemy merely operated in suspension of the litigation, and the question was usually raised by plea in abatement or by way of *puis darrein continuance*. These dilatory pleas being abolished, the convenient remedy now applicable is a stay of proceedings under the Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (f).

Review of the authorities.

*Dumenko v. Swift Canadian Co. Limited* (1914), 32 O.L.R. 87, considered and distinguished.

*Porter v. Freudenberg*, [1915] 1 K.B. 857, followed.

MOTION by the defendants for an order dismissing or staying the action, on the ground that the plaintiff was an alien enemy of the King.

July 16. The motion was heard by Mr. George S. Holmsted, K.C., Senior Registrar of the High Court Division, sitting in Chambers in the place of the Master in Chambers.



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July 19. MR. HOLMESTED:—I reserved judgment on this motion to consider whether the action should be dismissed or stayed—it having been commenced before the war. It is admitted that the plaintiff is an alien enemy resident out of the jurisdiction; and *Le Bret v. Papillon* (1804), 4 East 502, appears to be directly in point. The action there was commenced before the beginning of hostilities, and it was held that after war declared it could no longer be maintained. This case is referred to by the learned Chief Justice of the King's Bench in the case of *Dumenko v. Swift Canadian Co. Limited* (1914), 32 O.L.R. 87, apparently with approval; and, according to it, the action must be dismissed. The case of *Viola v. Mackenzie Mann & Co.* (1915), Q.R. 24 K.B. 31, was the case of an alien resident in Canada, and has, therefore, no bearing on the present case.

The order must go to dismiss the action with costs, but without prejudice to another action after the conclusion of peace between the British Empire and the Austro-Hungarian Empire.

The plaintiff appealed from the order of Mr. Holmested.

November 2. The appeal was heard by Boyd, C., in Chambers.

*O. H. King*, for the plaintiff.*B. H. Ardagh*, for the defendants.

November 4. BOYD, C.:—On motion made to dismiss this action, on the ground that the plaintiff is an alien enemy, and therefore not competent to maintain this action, or in the alternative for failure to prosecute the action, an order was made by the Senior Registrar of the High Court Division, dismissing the action with costs, without prejudice to bringing another action after peace had been declared between Austria and the United Kingdom. From this the present appeal has been taken.

The action is in tort, under Lord Campbell's Act, by the plaintiff, who resides in Galicia, and it was begun in June, 1913. On the 27th June, an order for security for costs was obtained,

and on the 3rd September, 1913, the sum of \$200 was paid into Court in response thereto. On the 13th September, issue was joined; and in December, 1913, an application was made by the plaintiff for a commission to issue to take evidence in Austria. In February, 1914, such commission was issued, and sent through the Austrian Consul to the local Court in Galicia, but, it is said, owing to the outbreak of hostilities in August, 1914, no return thereto has as yet been made.

The learned Registrar held that *Le Bret v. Papillon*, 4 East 502, was directly in point; and, as that case had been followed in *Dumenko v. Swift Canadian Co. Limited*, 32 O.L.R. 87, he, acting in conformity with that decision, dismissed the action with costs.

Having regard to many conflicting earlier English decisions, and the rather uncertain state of the practice, and the distinction which obtains in this case, I do not think I am bound to follow or to extend the *Dumenko* case.

A very clear line of division is to be marked as to cases where the alien plaintiff is rightly in Court and has a vested right of action as an alien friend before that character has been transformed by war to that of an alien enemy. Sufficient allowance has not been made for that in the case followed by the Registrar. The *Dumenko* case, as stated in the judgment, is founded on *Le Bret v. Papillon* and *Brandon v. Nesbitt* (1794), 6 T.R. 23. Now in *Brandon v. Nesbitt* the plaintiff was an alien enemy at the outset, and so was never rightly in Court. *Le Bret v. Papillon* is in point, for there the action was rightly brought, but its course was intercepted by declaration of war. The defendant's contention was made by way of dilatory plea, and the judgment was that the plaintiff should be barred from further having and maintaining the action. Nothing is said as to costs, and in form the action was not dismissed. In the *Dumenko* case, the judgment may well be rested on the fact that the plaintiff was in default in giving security for costs. By the order, if security not given the action was to be dismissed. The plaintiff, the alien enemy, moved to obtain an extension of time, which favour will not be granted to an alien enemy, and the action was

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well dismissed with costs. There was a concurrent motion to dismiss the action because of the plaintiff being an alien enemy, and the learned Chief Justice also dismissed with costs the action on this ground—therein exceeding the relief granted in *Le Bret v. Papillon*.

A distinctive point in the case in hand is that security for costs had been paid into Court. It is said that this money was derived from the Austrian Consul: that does not seem material; the money was paid into Court on behalf of the plaintiff and as by her agent, and it was paid in with the intent that the action should be duly prosecuted to an issue on the merits. To dismiss the action with costs would enable the defendants to lay hands on this money in Court, and so to penalise the plaintiff for no fault of her own, and giving an advantage to the defendants not earned by them. I would adopt an observation of Williams, J., in an alien case, *Shepeler v. Durant* (1854), 14 C.B. 582, 583, and say that so to deal with this fund in Court would be “manifestly contrary to justice and good faith.”

The plaintiff in this case was a resident of Galicia, in Austria, before the war broke out, and sued as well she might, as an alien friend, but after the cause was at issue, and pending the execution of a foreign commission, the situation was changed by declaration of war with Austria, and the plaintiff thereupon, as an alien enemy, became personally incapacitated to proceed further in the action. But this was only a temporary incapacity, which would end with the close of the war.

A new starting-point in regard to procedure and proceedings in the Courts in actions by or against alien enemies during a state of war is to be found in the decision of a very strong Court of eight Judges (the Attorney-General also acting as *amicus curiæ*), which was delivered by Lord Reading, L.C.J., in *Porter v. Freudenberg*, [1915] 1 K.B. 857. The enunciation of the law in this case was expressly declared to be undertaken in order to serve as a guide to the solution of the present day problems (p. 866).

This leading case establishes these propositions, among many others: that an alien enemy cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm (p. 873):

the mere fact of war operates *ipso facto* to suspend any rights of action which at the time of outbreak of war any alien enemy may possess (p. 877); the rule of law suspending the alien enemy's right of action is based upon public policy, to wit, that the alien enemy is not to have the advantage of enforcing his rights by the assistance of the King with whom he is at war (p. 880); the disability is impressed upon the alien enemy because of his hostile character (p. 880). In the case of a person, plaintiff before the outbreak of war, who thereby became an alien enemy, he cannot proceed with his action during the war. When once hostilities have commenced, he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Court in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace (p. 884).

The earlier cases shew that the fact of the plaintiff becoming during action an alien enemy merely operated in suspension of the litigation, and the question was usually raised by plea in abatement or by way of *puis darrein continuance*. There was merely temporary incapacity to go on with the action, and further proceedings remained in abeyance till the impediment was removed by the closing of the war: *Harman v. Kingston* (1811), 3 Camp. 150; *Flindt v. Waters* (1812), 15 East 260.

All these dilatory pleas have become obsolete, and are in fact abolished in this country. The convenient remedy now applicable is a stay of proceedings under the Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (f), "either generally, or so far as may be necessary for the purposes of justice."

In the last edition of Bullen & Leake, 1915, 7th ed., p. 496, the author says: "If the plaintiff was an enemy when the contract was made, this is a defence to an action on the contract, as the contract was illegal. If he becomes an alien enemy after the making of the contract, the defendant should, it seems, apply for a stay of proceedings."

In the last edition of Daniell's Chancery Practice, 8th ed. (1914), vol. 1, p. 83, it is said: "It does not appear what would be the effect of a war breaking out between the country of the plaintiff and this country after the commencement of the action:

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but from analogy to what was formerly the practice with regard to outlawry it is probable that under such circumstances the proceedings would be stayed."

In Trotter's Law of Contract during War, 1914, his opinion is that "if the plaintiff becomes an alien enemy subsequently to the commencement of the action it would seem that the case can either be dismissed (*Alcinous v. Nigreu* (1854), 4 E. & B. 217), or proceedings stayed till the restoration of peace (see *Shepeler v. Durant*, 14 C.B. 582)" (p. 54). This same text appears in the supplement to that volume in 1915, at p. 66, and this further is added: "In *Craig Line Steamship Co. Limited v. North British Storage Co.*, [1914] 2 Scots L.T. 326, the action was sisted on the prisoner becoming an enemy during its dependence." "But this alternative" (he goes on) "only exists when the contract is otherwise valid, and the sole question is its enforceability during war."

Here, I would note, there is no matter of contract involved; the action is in tort, under Lord Campbell's Act, and the plaintiff had a vested right of action and had commenced her action before the war.

In Quebec it has been held that when the action by an alien friend has been begun before the war the Court will not dismiss the case by reason of the war disenabling further progress by the alien enemy, but will order the proceedings to be suspended "*par force majeure*" till the close of the war: *De Kozarijouk v. B. & A. Asbestos Co.* (1914), 16 Q.P.R. 213, 218.

The matter of procedure has been fully considered in Scotch cases, and the uniform ruling is that an action brought by an alien friend cannot be further pressed when by declaration of war the plaintiff has become an alien enemy, and the proper course is to "sist" the action, i.e., to stay its further prosecution, pending the war, and this is stated to be "in conformity with the presumed wishes of the King;" the Court "does not allow an enemy to be treated in a manner contrary to natural justice:" *Orenstein & Koppel v. Egyptian Phosphate Co. Limited*, [1914] 2 Scots L.T. 293, 297. And in the later case cited by Trotter, the judicial decree was to "sist process *in hoc statu*, reserving all questions of expenses:" Nov. 1914, 2 Scots L.T. 326.

Such also has long been settled law in the American Courts. The analogy between cases of outlawry and cases of disability from the operation of war is recognised, and in *Levine v. Taylor* (1815), 12 Mass. 7, 9, 10, it is said: "If the disability occurs after the commencement of the action, it only suspends the proceedings quousque, etc.; and, after the disability is removed, the plaintiff may recontinue the suit. . . . Accordingly, in several cases, where the action was commenced before the declaration of war, this Court have expressed an opinion that it produced only a temporary disability; and, at their recommendation, the parties have agreed to continuances without costs on either side; in order to avoid the trouble and expense of new process at the termination of the war." See also *Hutchinson v. Brock* (1814), 11 Mass. 119.

I think that these are well-considered words, and to this issue the procedure under English law has been steadily tending, as appears from the citations already given from legal authors. The latest deliverance is to be found in the *Law Quarterly Review* for April, 1915, which was suggested by the leading case I have so largely quoted from in 1915. It is said in the *Law Quarterly Review* for April, 1915, vol. 31, p. 167: "It would seem that in the case of an alien plaintiff who has become an enemy since the writ was issued, one of two things may happen: (1) the proceedings may be stayed on the defendant's application, and the plaintiff can move to have the stay removed when peace is concluded; or (2) if the action comes on for trial it may be dismissed, reserving to the plaintiff the right to bring a fresh action after the termination of the war."

So long as the plaintiff remained quiescent during the war, no order to stay proceedings till the close of the war was really needed. If the plaintiff ventured to make any move in the case, it was at her own risk. Should any intervention of the Court be asked, it is not to be by way of dismissal (when everything is tied up by the war) but at most to stay the proceedings till the termination of the war, without costs, or, as in the Scottish case, with costs.

The present appeal should succeed, and the state

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of the authorities, with costs to the plaintiff in any event, and it does not appear fitting that any other order should be made.

The case, so far as it has developed, will remain *in statu quo*, to be taken up and continued after the war is over.

If either party chooses to take out an order to stay proceedings till the war ends, it may be issued—but it is only expressing what the law declares.

## [APPELLATE DIVISION.]

## MERRIAM V. KENDERDINE REALTY CO. (No. 1).

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Nov. 4.

*Partnership—Syndicate Formed to Buy Specific Land at Specific Price—Option Held by Member at Lower Price—Absence of Fraud—Right of Member to Payment of Price Agreed upon—Member of Syndicate Named as “Manager”—Payment for Services—Ratification by Majority of Members—Rights of Dissatisfied Minority—Provisions of Partnership Articles.*

A syndicate or partnership was formed to buy a specific tract of land at a specific price with the object of selling it in lots at a profit; K., a member of the syndicate, had, before its formation, secured an option for the purchase of the land at a much lower price. The option was accepted by K., the price fixed by the option was paid by K.'s wife, and the tract of land was, by direction of K. and his wife, conveyed by the original vendor to a trust company, who in turn conveyed it to a trustee and selling agent for the syndicate, at the specific price agreed upon:—

*Held*, upon an accounting by this trustee, in an action brought by dissatisfied members of the syndicate, after sales had been made and large profits realised, that the syndicate or partnership was properly charged with the specific price agreed upon, which had been paid to K. or his wife by the trustee; there was no duty on the part of K. to exercise the option for the benefit of the syndicate, or to obtain the land at a lower price than that agreed upon.

Cases of fraud, such as *Gluckstein v. Barnes*, [1900] A.C. 240, and cases of a member of a partnership buying his own property for the partnership, such as *Bentley v. Craven* (1853), 18 Beav. 75, distinguished.

The contract of partnership excludes any implied contract for payment for services rendered the firm by any of its members; and in this respect the managing partner or “manager” stands in no different position from any other partner; and the trustee, in accounting, was not allowed for sums paid to a member of the syndicate named in the syndicate articles as “manager;” he was not entitled to charge the partnership with the benefit it had derived from his services or the amount he might have had to pay another for such services.

By the syndicate agreement, the manager was given power to “convene meetings of the syndicate to deliberate and decide on any of the affairs of the syndicate . . . the majority of the votes to decide:”—

*Held*, that this did not justify such a meeting (by a majority) giving away the funds of the syndicate to one of its members; and an alleged ratification of the payments to the manager was not binding upon the syndicate.

APPEAL by the defendants the Kenderdine Realty Company from an order of LENNOX, J., dismissing their appeal from the report of an Official Referee.

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The following statement of the facts is taken from the judgment of RIDDELL, J.:—

On the 3rd April, 1912, R. E. Kemerer, believing there would be a good speculation in certain land near Welland, procured an option on land in the township of Crowland, about 60 acres in all, for \$225 per acre, less certain commission payable to one McCormick. While the option is in Kemerer's own name, he really bought for a "small syndicate" composed of himself, his wife, and some whose names are not disclosed. Not finding it practicable to deal with the land in this way, he approached Kenderdine, who was in the land business in Toronto, and between them they organised a new "syndicate" called the "Welland Industrial Reserve Syndicate." The articles of agreement set out specifically that this syndicate is formed "for the purpose of purchasing from the Trusts and Guarantee Company Limited the lands (setting out the lands) for the sum of forty thousand dollars, payable as follows: ten thousand dollars in cash and ten thousand dollars every sixty days thereafter until the said sum is fully paid, and for the purpose of disposing of the same at a profit." The articles provided: "4. W. B. Kenderdine . . . shall be the manager of the syndicate." "8. The manager shall have entire control of the affairs of the syndicate, and may conduct them in such manner as he thinks fit, but the manager is hereby directed to do the following things, at a date as early as practicable: (a) to make an agreement with the Trusts and Guarantee Company for the purchase of the said property for the sum of \$40,000, payable as above set out . . . ; (b) . . . (1) that the deed . . . shall be made by the said trust company to the said Kenderdine Realty Company . . . ; (2) that the said Kenderdine Realty Company shall hold the said property in trust for this syndicate . . ." The Kenderdine Realty Company were to be the sole selling agents, at a commission of 10 per cent., plus all expenses. The manager was given power to "convene meetings of the



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syndicate to deliberate and decide on any of the affairs of the syndicate . . . the majority of votes to decide. . . .”

The first member of this syndicate did not come in until the 30th April (so far as the evidence shews); Kenderdine and Kemerer were both members of it; the Kenderdine Realty Company was controlled by Kenderdine.

The syndicate being thus under way, Kemerer exercised his option, his wife paying the price, and the deed being made to the Trusts and Guarantee Company, on the 9th May, 1913. On the 27th May, Kenderdine, the manager of the syndicate, carried out (in substance) the direction to him numbered (a) above: a conveyance was made by the Trusts and Guarantee Company to the Kenderdine Realty Company for \$40,000, \$20,000 down and \$20,000 on mortgage.

Considerable land was sold and at a handsome profit by the Kenderdine Realty Company. On the 23rd February, 1914, a conveyance was made by the Kenderdine Realty Company to the Fidelity Securities Corporation, which I do not further notice, as that conveyance has been got rid of by a consent judgment of the Court.

On the 28th February, 1914, this action was begun by certain dissatisfied members of the syndicate (these were allowed at the trial to amend by claiming to sue on behalf of all) against the Kenderdine Realty Company and the Fidelity Securities Corporation, claiming an account, a receiver, etc. A judgment was ordered by MEREDITH, C.J.C.P., which did not grant the prayer for a receiver, but directed as follows:—

“1. An account of the assets, property and effects, real and personal, of the Welland Industrial Reserve Syndicate, in the pleadings mentioned, come to the hands of the defendants the Kenderdine Realty Company Limited, as trustees of the said Welland Industrial Reserve Syndicate.

“2. An account of the dealings of the defendants the Kenderdine Realty Company Limited with the assets, property and effects, real and personal, of the said Welland Industrial Reserve Syndicate.

“3. And an account of the property, moneys, and securities of the said Welland Industrial Reserve Syndicate in the hands of the said defendants the Kenderdine Realty Company Limited, or now outstanding and unrealised.”

Mr. McAndrew, the Referee, took considerable evidence, and on the 21st April, 1915, made his report. In his report, the Referee disallowed as follows:—

“4. I have disallowed the following amounts claimed by the Kenderdine Realty Company Limited, as having been properly paid by it on account of the Welland Industrial Reserve Syndicate:—

“On account of purchase-price of land .....	\$28,500.00
“As overriding commission to W. B. Kenderdine .....	5,226.66
“Office expenses .....	1,718.84
“Rent .....	1,259.67
“Salaries and fees .....	2,731.17

—————  
\$39,436.34.”

From this disallowance the Kenderdine Realty Company appealed; their appeal was dismissed by Mr. Justice Lennox; and they now further appeal.

October 22. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

A. McLean Macdonell, K.C., for the appellants, argued that Kemerer occupied no fiduciary position when he purchased the property, and should not have been declared a trustee for the syndicate: *In re Hess Manufacturing Co.* (1894), 21 A.R. 66, affirmed 23 S.C.R. 644. Reference was also made to *In re Cape Breton Co.* (1885), 29 Ch. D. 795; *In re Lady Forrest (Murchison) Gold Mine Limited*, [1901] 1 Ch. 582; *Highway Advertising Co. v. Ellis* (1904), 7 O.L.R. 504.

A. Cohen, for the plaintiffs, respondents, argued that the members of the syndicate were member of a partnership, by whose moneys the purchase-money of the property was paid, and were, therefore, entitled to the benefit of the purchase: *Gluckstein v. Barnes*, [1900] A.C. 240; *Bentley v. Craven* (1853), 18 Beav. 75; *Burton v. Wookey* (1822), Madd. & Geld. 367; *York*

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and *North Midland R.W. Co. v. Hudson* (1853), 16 Beav. 485, 499. The last-mentioned case shews that the defendants are not entitled to the commission and other allowances claimed, in the absence of any express contract to that effect, and that these allowances could not be justified by the alleged majority vote of the members of the syndicate.

November 4. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—The appeal divides itself into two branches: (1) as to the first item of \$28,500; (2) as to the remainder.

# I.

The ground of disallowance of the first item is as follows: this sum was paid as part of a purchase-price of \$40,000; the Referee considers that the Welland Industrial Reserve Syndicate, being a partnership of which Mr. and Mrs. Kemerer were members, is entitled to the benefit of their (his or her) purchase (and option); and, consequently, the real purchase-price should not have been \$40,000, but the amount fixed by the option—that the Kenderdine Realty Company were well aware of all the facts, and should not have paid the larger amount.

It may be said at once that, if the syndicate was entitled to the benefit of Kemerer's bargain, the Referee is right.

That the syndicate was a partnership may be conceded (that is, while technically it was not a partnership proper, it may for all purposes of this appeal be treated as a partnership); that Kemerer and his wife were members thereof is also true—but I cannot see that the partnership could insist on taking his or her property at the price paid for it.

Cases such as *Gluckstein v. Barnes*, [1900] A.C. 240, are not infrequent, but they are cases of plain fraud—lying: these have no application here. Nor are the cases of a member of a partnership buying for the partnership his own property, applicable—such are *Bentley v. Craven*, 18 Beav. 75, *In re Cape Breton Co.*, 29 Ch. D. 795, and the like. The former line of cases depends on well understood and undoubted principles—the latter is thus expressed by the Vice-Chancellor, Sir John Leach, in *Burton v. Wookey*, Madd. & Geld. 367, at p. 368: "It is a

maxim of Courts of Equity that a person who stands in a relation of trust or confidence to another, shall not be permitted in pursuit of his private advantage to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The defendant here stood in a relation of trust or confidence toward the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price: . . . the saving by a low price of the article purchased was to be equally divided between him and the plaintiff;" accordingly the defendant, who made a profit by trading goods of his own for those of his partnership, was ordered to account for the profit made by him.

Had the syndicate been formed to buy land generally, or even to buy this specific piece of land (without more), these cases might apply—the duty of Kemerer would then be to buy land or this land "at the lowest possible price:" the other members of the syndicate would have the right to expect that he would use every reasonable endeavour to keep down the price.

But here there was no such duty—the syndicate was formed to buy this specific land at a specific price—Kemerer had the right to have this price paid for this property—that was the basis of the contract between him and the other members of the syndicate: and there was no duty cast upon him to try to have the price reduced.

The same remarks apply to Mrs. Kemerer, and to Kenderdine and his wife.

Of course there is no evidence that Kemerer would have taken partners on terms more advantageous to them than that the sum of \$40,000 should be paid for the property—and assuredly he never did so. To my mind it is wholly unjust that the plaintiffs, who have already made a profit of over 200 per cent., should be allowed a profit which is contrary to the express terms of their agreement.

The manager was commanded by the agreement to pay \$40,000 for the property, and he has followed out the express agreement and direction—he has, indeed, made a variation in the time of payment, but that is advantageous to the syndicate, and in any case is a matter of detail, not affecting the present question.

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Then it is said that the deed of the land was not obtained till after the formation of the syndicate; and, consequently, it must be considered that this deed was really for the syndicate. But this I do not accede to—it was the option which was material, and which occasioned the deed—Kemerer held the option, and by the expenditure of money, not the money of the syndicate, he carried the option into effect—there was no duty on his part to exercise the option for, and for the benefit of, the syndicate—they were to have the land for \$40,000.

Nor do I think it material that the deed was taken as it was—bearing in mind the express condition of the agreement, it must needs be so taken, or, at least, the title to the land must be got into the Trusts and Guarantee Company in some way.

## II.

The other items stand on a different basis. Speaking broadly, the claim is based on something like this: to make a sale of land a success, a sales-agent should be employed, such a sales-agent would have cost what is charged in the items which are disallowed—therefore, it is argued, these sums should be allowed. This will not do—the agreement provides that Kenderdine shall be manager, but does not provide a salary or allowance as such.

It is quite clear that the contract of partnership excludes any implied contract for payment for services rendered the firm by any of its members: *Thompson v. Williamson* (1831), 7 Bli. N.R. 432; *Holmes v. Higgins* (1822), 1 B. & C. 74.

Moreover, the managing partner or “manager,” stands in no different position in this respect from any other partner: *Hutcherson v. Smith* (1842), 5 Ir. Eq. R. 117; *Thornton v. Proctor* (1793), 1 Anst. 94; *East-India Co. v. Blake* (1673), Finch 117. Some interesting and valuable remarks by Sir John Romilly, M.R., on a cognate matter, are to be found in *York and North Midland R.W. Co. v. Hudson*, 16 Beav. 485, at pp. 499, 500. Adapting the language in that case to the facts in this, it may well be that Kenderdine was content to accept the added dignity and prestige he would achieve from being manager of a successful land scheme—and the handsome commission paid to his own company—as sufficient remuneration for his services as manager.

However that may be, he cannot charge this partnership with the benefit it has derived from his services or the amount he might have had to pay another for such services.

But it is said that at a meeting of the syndicate called under clause 9 of the articles, a majority ratified these payments. I cannot read an agreement that the meeting might "deliberate and decide on any of the affairs of the syndicate" as justifying such a meeting (by a majority) giving away the funds of the syndicate to one of its members—it would require much stronger language to justify such an interpretation of the powers of the majority.

I think this appeal should be dismissed. As success is divided, there should be no costs here or before Mr. Justice Lennox.

*Appeal dismissed; no costs.*

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[APPELLATE DIVISION.]

MERRIAM V. KENDERDINE REALTY CO. (No. 2).

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1915

Sept. 24.  
Nov. 4.

*Receiver—Partnership—Syndicate—Trustee—Judgment Directing Payment of Moneys into Bank—Neglect to Comply with—Misunderstanding—Motion for Appointment of Receiver—Locus Pœnitentiæ—Terms.*

By the judgment entered after the trial of the action, the defendant trustee was required to pay into a named bank all money received or to be received by it (the trustee) in connection with the business of the syndicate or partnership for which it was trustee. The appointment of a receiver had been asked for by the plaintiff in the writ of summons and statement of claim, but was not directed by the judgment so entered. After this judgment and after the report of a Referee had been made pursuant to it, but not confirmed, the plaintiffs applied for the appointment of a receiver:—

*Held*, that the Court has power to appoint a receiver at any stage of the action and for any sufficient cause; but that no ground for the appointment of a receiver which existed at the time of the trial, or at all events at the teste of the writ, could, in this action and at the stage indicated, be urged.

In partnership actions, in view of the serious effect of such an order, the Court is loath to exercise the power to appoint a receiver, but in a proper case will unhesitatingly do so.

In this case, it was admitted that the defendant trustee had failed to comply with the direction to pay into the bank money received before the trial; but, as it appeared that the neglect was due to a misunderstanding, the defendant trustee was allowed, upon terms, an opportunity to remedy its neglect; in default of payment of the money into the bank and compliance with the terms imposed within a time fixed by the Court, the appointment of a receiver was ordered.

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v.  
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REALTY CO.  
(No. 2.)

**MOTION** by the plaintiffs for an order removing the defendant the Kenderdine Realty Company from its position as trustee for the plaintiff syndicate, for the appointment of a receiver, for a declaration that a certain resolution of the members of the syndicate with regard to the sale of certain of the land of the syndicate was void, for a declaration that a resolution appointing the defendant the Fidelity Securities Corporation as trustee was void, and for payment by the defendant the Kenderdine Realty Company to the receiver of all moneys in the hands of that company.

September 23. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*W. J. McWhinney, K.C., and A. Cohen, for the plaintiffs.*  
*C. A. Moss, for the defendants.*

September 24. MIDDLETON, J.:—The plaintiffs are some only of the members of the syndicate. It is asserted by the defendants and denied by the plaintiffs that the plaintiffs are a dissentient minority only. The action was brought claiming many things—among others substantially the relief now sought. At the trial, a judgment was given cancelling a conveyance made to the Fidelity Securities Corporation, and referring it to an Official Referee to take an account of the dealings of the Kenderdine Realty Company with the property held by it in trust for the syndicate. Further directions and costs were reserved.

The account has been taken, but the report is not yet confirmed, as an appeal to the Appellate Division is pending; so the case is not ripe for a motion for judgment upon further directions.

Counsel for the plaintiffs practically abandoned all claims for relief save the appointment of a receiver and an order for payment of the assets to the receiver. This relief was sought in the action, and was not granted; and I do not think that I can now interfere.

It appears to me that there is no practice which authorises the removal of a trustee and the appointment of a new trustee or of a receiver in his place, in the absence of all those beneficially interested. One of the *cestuis que trust* has no right, for any

such purpose as this, to assume to represent all. All have a right to be heard before the property is taken from the custody where it has been placed by the joint action.

Substantially this syndicate was a partnership. What is really sought is a dissolution of that partnership, and the winding-up of its affairs, in the absence of a majority of the partners.

The motion will be refused, with costs, but without prejudice to any application that may be made in a properly constituted action, and without prejudice to any motion that may be made against the defendant the Kenderdine Realty Company, if, as was alleged, it has failed to obey any orders that have been made in the action.

The plaintiffs appealed from the order of MIDDLETON, J.

October 22. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

A. *Cohen*, for the appellants, argued that the defendants were in default in payment of money ordered by the judgment pronounced at the trial to be paid by them, and that, by reason of such default, the Court was entitled to appoint a receiver for that purpose.

A. *McLean Macdonell*, K.C., for the defendants, respondents, relied on the judgment of MIDDLETON, J.

November 4. The judgment of the Court was delivered by RIDDELL, J.:—The judgment at the trial of this case (see *Merriam v. Kenderdine Realty Co.* (No. 1), *ante*) directed the defendant the Kenderdine Realty Company Limited as follows:—

“3. And this Court doth further order and adjudge that the said defendant the Kenderdine Realty Company Limited do pay all moneys received or to be received by it in connection with the business matters and transactions of the Welland Industrial Reserve Syndicate into the Standard Bank of Canada to the credit of the Kenderdine Realty Company Limited, less all necessary expenses, including proper payments to the Trusts and Guarantee Company Limited, necessary to obtain discharges of mortgages in reference to parcels of land sold, and less all necessary expenses to the collection of such moneys, including

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agents' commissions, and do not withdraw any of the said moneys therefrom, or do pay the same into Court to the credit of this action, subject to the order of this Court."

The appointment of a receiver was claimed in the writ and pleadings; but this was not directed in the judgment at the trial.

On the 23rd September, a motion was made by the plaintiffs before Mr. Justice Middleton for the appointment of a receiver and other relief, but in the argument only the claim for a receiver was pressed. The learned Judge (on the 24th September) dismissed the motion, on the ground that the appointment of a receiver had been refused at the trial, and there was no appeal from that judgment—and, so far as the application could be based on "further directions," the time for further directions had not yet arrived, the report not being confirmed.

We agree that no ground for the appointment of a receiver can in this action be at present urged which existed at the time of the trial of the action—or at all events at the teste of the writ.

But it is urged that since the trial the defendants are at fault—that they have failed to comply with the order of the Court to pay into the bank the money received before the trial. This is admitted, and counsel for the defendants contended that the judgment contained no order for paying any money except that received after the trial. The original judgment being produced, he admitted his error.

There is no doubt as to the power of the Court to appoint a receiver at any stage of the action and for any sufficient cause. In partnership actions, in view of the very serious effect of such an order, the Court is loath to exercise this power, but in a proper case will unhesitatingly do so: sometimes to mark its sense of the impropriety of the conduct of an offending partner, as in *Evans v. Coventry* (1854), 3 Drew. 75, 82, 5 D.M. & G. 911; where a partner has so misconducted himself as to shew that he is not to be trusted, etc.—*Estwick v. Conningsby* (1682). 1 Vern. 118; cf. *Young v. Buckett* (1882), 30 W.R. 511; *Baldwin v. Booth*, [1872] W.N. 229; *Jefferys v. Smith* (1820). 1 J. & W. 298; *Chaplin v. Young* (1862), 6 L.T.N.S. 97; and the very im-

portant case of *Hall v. Hall* (1850), 3 Macn. & G. 79, 86; *Const v. Harris* (1824), Turn. & Russ. 496, 523.

Were this a wilful default on the part of the defendants, I think we should appoint a receiver and manager, notwithstanding the serious effect upon the undertaking: it would not do to allow a company to defy the order of the Court and retain moneys in its own hands which should be safe in the bank. But it would seem that the neglect has been due to a misunderstanding of the direction of the Court: the defendants then may have an opportunity to put themselves right by paying the money into the bank as ordered.

If the defendants, within ten days, pay the amount into the bank as ordered, filing at the same time a statement under oath verifying the amount, and pay the costs of the motion and of this appeal within ten days after taxation thereof, the appeal will be dismissed: otherwise the appeal will be allowed with costs here and below. In the latter case, the particular form of the order may be spoken to.

[NOTE: The Court was, by special leave, moved by counsel for the defendant the Kenderdine Realty Company to vary the minutes of this judgment, on the ground of mistake in the admissions of counsel. The Court allowed the applicant company a further period of two weeks to pay into the bank the sum of \$10,936.34 improperly retained by the company; and, the company making default, a receiver was appointed on the 1st December, 1915.]

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(No. 2.)  
—  
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[APPELLATE DIVISION.]

ANDERSON V. FORT WILLIAM COMMERCIAL CHAMBERS LIMITED.

1915  
—  
Nov. 4.

*Mechanics' Liens—Lien of Sub-contractor—Estoppel by Conduct—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 6—"Abandonment"—Sec. 22 (1).*

Section 6 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, provides that, unless he signs an express agreement to the contrary, any person (as described) shall have a lien:—

*Held*, that a person cannot by his conduct estop himself from claiming a lien—an estoppel in pais cannot do what the section declares only a signed agreement can do.

Section 22 (1) provides that a claim for lien by a contractor or sub-contractor may be registered within 30 days after the completion or abandonment of the contract:—

*Held*, that, where a sub-contractor left the work under the belief that the contract was completed, but afterwards, on it being decided that he was

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wrong, went on and finished his work, the registration of his claim of lien within 30 days from the day upon which he so finished it, was in time—the first cessation of work was not an “abandonment” within the meaning of sec. 22.

Judgment of McKAY, Dist. Ct. J., affirmed.

APPEAL by the defendants from the judgment of a District Court Judge in favour of the plaintiff, a sub-contractor for placing heating apparatus in a building which one Stewart contracted to erect for the defendants upon their land. The plaintiff completed the work under his sub-contract, and registered a claim of lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, which he sought in this action to enforce. Stewart did not finish the work under his contract, and it appeared that it would cost \$1,500 to finish it. The County Court Judge gave judgment for the plaintiff for \$915.18 and \$125 costs.

October 20 and 21. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

*W. N. Tilley*, K.C., for the appellants, argued that the plaintiff had estopped himself from claiming a lien by taking part with Stewart in establishing his claim upon an arbitration: *Ewing v. Dominion Bank* (1904), 35 S.C.R. 133, 144, 153. There being no balance coming to the contractor, no lien attached, and the plaintiff's conduct indicated an intention to look to Stewart for payment.

*C. C. Robinson* (for *C. A. Moss*, absent on active service with His Majesty's Forces), for the plaintiff, the respondent, argued that the plaintiff was entitled to a lien for the two items of work allowed under this judgment: *Day v. Crown Grain Co.* (1907), 39 S.C.R. 258. There is no evidence on which a claim to estoppel can be founded, and there can be no estoppel as to matters under the 4th, 5th, and 6th sections of the Mechanics and Wage-Earners Lien Act: see Wallace's *Mechanics' Lien Laws in Canada*, 2nd ed., p. 103. He also referred to *Jorden v. Money* (1854), 5 H.L.C. 185, 214, 215; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L.R. 6 H.L. 352, 360, 361; *Chadwick v. Manning*, [1896] A.C. 231, 237, 238; *George Whitechurch Limited v. Cavanagh*, [1902] A.C. 117, 121; Pollock on Contracts, 7th ed., p. 713, Appx. (note K).

*Tilley*, in reply, argued that at the time when the acts relied

on as constituting an estoppel were done, there was no right of lien. He referred to *Hurst v. Morris* (1914), 32 O.L.R. 346; *Eadie-Douglas v. Hitch & Co.* (1912), 27 O.L.R. 257.

November 4. The judgment of the Court was delivered by RIDDELL, J.:—One Stewart had a contract to build for, and on the property of, the defendants; he entered into a sub-contract with the plaintiff for the plaintiff to put in certain heating apparatus.

Stewart and the plaintiff contended in good faith that their contracts were completed, but the defendants refused to accept as complete. Stewart and the plaintiff left the building, believing their work done.

After the lapse of some time, it was agreed by Stewart and the defendants to submit to arbitration all matters in dispute—the plaintiff gave evidence in the arbitration, but was not a party to it.

The award made on the 24th June, 1914, found that “there is now due and owing from the said the Fort William Commercial Chambers Limited to the said . . . Stewart for work done and materials supplied, including all claims for extras, less deductions, the sum of \$15,345.36 over and above the contract price, but subject to the condition that the sum of \$1,500 of the said amount is to be retained until the following work is completed to the satisfaction of . . . the architect, . . . namely”—setting out in detail what was to be done, including some of the work in the plaintiff’s sub-contract. The result was that the main contract was held not to be completed; as a necessary consequence, the plaintiff’s sub-contract was also held not to be completed. All parties were satisfied with the award, and the money found due was paid shortly thereafter to Stewart. Before this payment, Stewart’s manager, Webster, saw the plaintiff and had some conversation with him. In one view of the case, the precise words of this conversation would be material, but not in the view I take of it. The substance of the transaction is that the plaintiff was informed that the defendants were going to pay the balance to Stewart, and was recommended to take proceedings to protect himself; he was also told that the defendants had no right to pay him anything and would pay the money direct to Stewart. He made no objection and took no steps to protect himself; he had perfect confidence in Stewart, and in fact Stewart

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would have paid him but for circumstances over which neither had any control.

Stewart went on to finish the contract, and the plaintiff went on to finish his, according to the original plan. Stewart did not finish his contract, and it will cost the \$1,500 to complete it. The plaintiff did complete his contract and filed a claim of lien under the Act, R.S.O. 1914, ch. 140.

On the matter coming on for trial before His Honour Judge McKay, the plaintiff obtained judgment for his claim for \$915.18 and \$125 costs, in all \$1,040.18. The defendants now appeal.

The first ground of appeal argued before us was that the plaintiff had estopped himself from claiming a lien by his conduct. I should require further consideration before deciding that the conduct disclosed here could, in law, effect an estoppel; but I do not think it necessary to pass upon that point, because, in my judgment, sec. 6 of the Act prevents any such effect following from such conduct. "Unless he signs an express agreement to the contrary . . . any person . . . shall . . . have a lien . . ." It would emasculate this section to hold that an estoppel in pais would do what the section declares only a signed agreement can do.

It is, however, claimed that the first cessation of work was an "abandonment" under sec. 22 (1)\*; and no claim for lien was registered within 30 days from that time. But what took place in the present instance was not an "abandonment" of the contract. An abandonment of the contract contemplated by this section is, not leaving a work under the belief that the contract is completed, but, knowing or believing that the contract was not completed, declining to go on and complete it. Nothing of the kind was done here. The plaintiff, on it being decided that he was wrong, went on and finished his work. There never was any intention on his part to refuse to complete a contract which he knew or believed was not completed. That being so, I think that sec. 22 (1) does not apply. The contract was not completed or abandoned.

The judgment appealed from is right, and the appeal must be dismissed with costs.

\*22.—(1) A claim for lien by a contractor or sub-contractor, in cases not otherwise provided for, may be registered before or during the performance of the contract, or within 30 days after the completion or abandonment thereof.

[IN CHAMBERS.]

1915

RE HOGAN V. TOWNSHIP OF TUDOR.

Nov. 6.

*Municipal Corporation—Claim against for Loss of Sheep—Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, sec. 18—Application to Council—Refusal—Enforcement by Action—Division Court—Prohibition.*

By sec. 18 of the Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, a right of relief is given to sheep-owners, whose sheep have been killed or injured by any dog, on an application satisfactory to the council; but nothing in the Act or otherwise makes the municipal corporation liable in a court of law for the amount of the damage done.

A Division Court was prohibited from entertaining an action to recover from a township corporation the value of sheep alleged to have been killed, in the township, by dogs of unknown owners.

MOTION by the Corporation of the Township of Tudor, defendants in an action in the Sixth Division Court in the County of Hastings, for an order prohibiting the enforcement of a judgment in that Court against the defendants for the value of certain sheep belonging to the plaintiff, alleged to have been killed, in the township, where the plaintiff lived, by dogs of unknown owners.

November 5. The motion was heard by BOYD, C., in Chambers.

*Frank Denton*, K.C., for the defendants.

*M. H. Ludwig*, K.C., for the plaintiff.

November 6. BOYD, C.:—The application to prohibit the Division Court from enforcing a judgment against the township corporation for the value of certain sheep belonging to the plaintiff, and alleged to have been killed by dogs of unknown owners, should, I think, succeed.

The application for damages was made under the Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, sec. 18\*, to the

\*18.—(1) The owner of any sheep killed or injured by any dog, the owner of which is not known, may within three months after the killing or injury apply to the council of the municipality in which such sheep was so killed or injured, for compensation for the injury; and if the council is satisfied that he has made diligent search and inquiry to ascertain the owner and keeper of such dog, and that he cannot be found, they shall award to the aggrieved party for compensation a sum not exceeding two-thirds of the amount of the damage sustained by him; and the treasurer of the municipality shall pay over to him the amount so awarded.

(2) The council may, before determining, examine parties and witnesses under oath.

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municipal council, who refused to entertain the claim or give relief. The grounds on which the council acted do not appear—but that makes no difference in the result of the application. There is a statutory right of relief given to sheep-owners on an application satisfactory to the council. But nothing in the Act or otherwise makes the council liable in a court of law for the amount of such damage. The special relief vouchsafed by the Legislature cannot be transformed or enlarged into a legal right of action against this public body.

The further prosecution of the action should be inhibited.

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Nov. 9.

[IN CHAMBERS.]

MENZIES v. McLEOD.

*Discovery—Examination of Co-defendant—"Party Adverse in Interest"—Rule 327—Action to Establish Will—Defendant in same "Interest" as Plaintiff.*

Having regard to the genesis of Rule 327, now in force in Ontario, and to the practice which has obtained, it is not competent to introduce the limitations as to examination of co-defendants which are found in the English practice, under Rules differently framed and expressed. The English phrase is "opposite party;" the Ontario phrase, "party adverse in interest." "Interest" is a flexible term, meaning pecuniary interest, or any other substantial interest in the subject-matter of litigation. In the Ontario practice, an actual issue in tangible form spread upon the record is not essential, so long as there is a manifest adverse interest in one defendant as against another defendant.

*Moore v. Boyd* (1881), 8 P.R. 413, approved.

*Fonseca v. Jones* (1909), 19 Man. R. 334, disapproved.

Review of the English authorities.

Origin and history of Rule 327.

In an action to establish a will, a defendant who was entitled thereunder to a substantial legacy was held "adverse in interest" to a class of defendants who were contesting the validity of the will on the ground of undue influence and incapacity; and an order was made compelling her attendance for examination for discovery at their instance.

MOTION by the defendant McLeod and two other defendants, next of kin of Margaret Menzies, deceased, to commit the defendant Martha McGuire, for refusal to attend for examination for discovery, at the instance of the applicants, as a "party adverse in interest" to them, under Rule 327.\*

\*Rule 327.—(1) A party to an action, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination as a witness except as hereinafter provided.

The action was brought, by the executor named in an instrument purporting to be the last will of the deceased, to establish it as such; the plaintiff and the defendant McGuire were the principal beneficiaries under that instrument; and the applicants, though also beneficiaries under the instrument, would be entitled to larger shares of the estate in the event of an intestacy being declared.

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November 5. The motion was heard by BORD, C., in Chambers.

*W. Lawr*, for the applicants.

*A. W. Langmuir*, for the defendant Martha McGuire.

November 9. BORD, C.:—The constitution of the Court of Chancery in this Province was altered by 12 Vict. ch. 64, and in the 11th section, referring to the report of the Chancery Commission before appointed, which recommended certain changes in the procedure, it was declared desirable to give effect thereto in regard to enabling the plaintiff to obtain discovery through the medium of a *vivâ voce* examination of the defendant, and by extending a like privilege to the defendant in relation to the *vivâ voce* examination of the plaintiff. Under that power, the Judges framed and issued Order L. (1850), which begins: "Any party to a suit may be examined as a witness by the party adverse in point of interest without any special order for that purpose." See Cooper's Rules, 1851. This Order of 1850 appears to be the first wherein the phrase "adverse in point of interest" is used, and thence it has passed into current usage in subsequent Orders, to the present day. It is carried into the Orders of 1863 as No. XXII. (1).

By the Administration of Justice Act, R.S.O. 1877, ch. 50, sec. 156, the Legislature carried the equity practice into actions at law in almost identical words: "Any party to an action at law, whether plaintiff or defendant, may at any time after . . . issue obtain an order for the oral examination . . . of any party adverse in point of interest . . . touching the matters in question in the action." The only practical difference was that at law an order was required, but it was issued as of course.

Then the two lines of practice were blended together in the Consolidated Rules of 1887. These sections were left out of the Judicature Act of that date, but were declared to be of statutory



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force by 51 Vict. ch. 2, sec. 4. In this consolidation the rule appears as Rule 487. The same rule is reproduced as No. 439 in the Consolidated Rules of 1897, and it is now found in the Rules of 1913 as No. 327. The meaning and language are identical with that of the earliest Order—except that, for the sake of conciseness, “adverse in point of interest” appears as “adverse in interest.” When the expression was first used in 1850 and afterwards, the word “interest” in connection with parties and witnesses had a well-defined meaning. It meant direct pecuniary or other legal, as distinguished from moral, interest in the matters and in the results involved in the litigation. The word is of frequent recurrence in the legislation on evidence in the middle of last century in this Province: 12 Vict. ch. 70; 14 & 15 Vict. ch. 66; and 16 Vict. ch. 19.

The object of this action is to establish the will of Margaret Menzies. The judgment will operate *in rem* and conclude the rights of all parties interested. The executor sues alone, and makes the beneficiaries and next of kin defendants. Some of the latter, who are also beneficiaries, contest the validity of the will on the ground of undue influence and incapacity. The will was executed at Daytona, Florida, U.S.A., where, it is alleged, the testatrix, an old and diseased woman, was in the hands of the executor and one of the defendants, Martha McGuire, who was the nurse in waiting on the deceased, and who gets a legacy of \$10,000. The estate is a large one, and, after the legacy to the nurse and pecuniary legacies of \$1,000 each to eleven next of kin, the residue goes to the executor. The defendant McGuire has entered no defence, and the pleadings against her are closed. It is stated on affidavit that the plaintiff and the defendant McGuire are in the same interest, and are neither of them of the next of kin of the testatrix.

A notice was given by the contestants to McGuire to attend for examination under Rule 327 (1), but she made default on the ground that she was not compellable; and to test this question the matter has been argued before me.

Counsel for McGuire relies on a Manitoba decision of Mr. Justice Mathers in 1909, *Fonseca v. Jones*, 19 Man. R. 334, in which, declining to regard *Moore v. Boyd* (1881), 8 P.R. 413, as well decided, he follows English cases and holds that a defendant

is not a party adverse in point of interest to another party on the same side of the record within the meaning of the Rule (apparently corresponding to ours) unless there are some rights to be adjusted between them in the action.

This testamentary action discloses really two sets of litigants who are adverse—those who seek to uphold the will and those who seek to invalidate it. No doubt as to which side McGuire is on; if the will stands, she gains \$10,000; if it falls, she loses all. She might well have been made a co-plaintiff: her whole interest in the litigation is with the executor and in his success. An actual issue in tangible form spread upon the record is not essential, so long as there is a manifest adverse interest in one defendant as against another defendant. “Adverse interest” is a flexible term, meaning pecuniary interest, or any other substantial interest in the subject-matter of litigation.

*Moore v. Boyd*, 8 P.R. 413, was decided by the Master in Ordinary in 1881, and has been referred to with approval subsequently (*Bank of Ottawa v. Harty* (1906), 12 O.L.R. 218, 220), though not as to the particular point in question. But on that point his interpretation of what is meant by a party adverse in interest accords with that expressed by Mowat, V.-C., in *Forsyth v. Johnson* (1868), 14 Gr. 639, at p. 643.

Having regard to the genesis of the Ontario Rule now in force, Rule 327, and the practice which has obtained, it is not competent to introduce the limitations as to examination of co-defendants which are found in the English practice, under Rules differently framed and expressed. The characteristic English phrase is “opposite party,” and ours is “party adverse in interest.” The very point of difference is noted by Cotton, L.J., in *Molloy v. Kilby* (1880), 15 Ch. D. 162, at p. 164: “‘Opposite party or parties,’” he says, “does not mean a party or parties having an adverse interest, but a party or parties between whom and the applicant an issue is joined.” The English decisions which Mr. Justice Mathers has followed decide that as between co-defendants one cannot examine the other for discovery unless between the two there be some right to be adjudicated (Lord Esher) or some community of interest (Lindley, L.J.), or some question in conflict in the action (Lopes, L.J.) This is the summary of the expressions used in *Shaw v. Smith* (1886), 18 Q.B.D. 193, as given

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by A. L. Smith, L.J., in *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q.B. 124, 127.

Another case under English practice which would conclude the present applicants' right to examine is *Marshall v. Langley*, [1889] W.N. 222: where the defendant admits the plaintiff's case and puts in no defence and claims no relief, there is no issue raised, and he cannot be treated as an opposite party by a co-defendant who wishes to examine. The last English case is *Birchal v. Birch Crisp & Co.*, [1913] 2 Ch. 375.

I am by no means sure that even under the English limitations there is not something to be adjudicated here between the co-defendants—there is a community of interest in the disposal of the estate, though one claim as against the other is adverse.

In my judgment, *Moore v. Boyd* is to be preferred to *Fonseca v. Jones*. Within the meaning of the Rule, the defendant McGuire is a party to the action adverse in interest to her co-defendants who seek to gain discovery from her as to the execution of the will and the condition of the testatrix. The Court favours an early disclosure of all matters surrounding the execution of an impeached will from those who know, that an opportunity may be given in a proper case to withdraw from hopeless or unnecessary litigation.

It is to be remarked also that in probate actions especially the Court exercises a wider latitude in ordering discovery than in other actions not *in rem*, owing to the nature of the issues raised. It is the duty of the Court not only to do justice between the parties, but also to do justice to the deceased: Tristram and Coote's Probate Practice, 14th ed., p. 506.

In all likelihood this nurse knows more about the physical and mental condition of the testatrix than any other available person.

The defendant McGuire should, on due notice of time and place, attend at her own expense and submit to be examined under Rule 327.

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## RE SOVEREIGN BANK OF CANADA.

## NEWMAN'S CASE.

*Bank—Winding-up—Contributories—Right to Discovery—Examination of Bank Manager—Winding-up Act, R.S.C. 1906, ch. 144, sec. 117—Scope of—Liquidator.*

Section 117 of the Winding-up Act, R.S.C. 1906, ch. 144, confers a special power, of inquisitorial character, intended to be used by the liquidator, acting under a winding-up order, for his own guidance in the conduct of the liquidation. But, in certain circumstances, there may be some right of discovery open to a person charged in the winding-up as a contributory. In this case it was directed, upon an appeal, that an Official Referee, before whom the reference under an order for the winding-up of a bank was pending, should consider the application of five persons whose names were placed by the liquidator upon the list of contributories, for leave to examine for discovery the former general manager of the bank, in the view that the applicants might have a claim to invoke the aid of sec. 117.

*Whitworth's Case* (1881), 19 Ch. D. 118, 120, and *Re Penysflog Mining Co.* (1874), 30 L.T.R. 861, applied.

APPEAL by one Newman and four other persons whom the liquidator of the bank sought to make contributories in the winding-up of the bank, from an order of J. A. C. Cameron, Esquire, Official Referee, in the winding-up, refusing to allow the appellants to examine for discovery one Frederick G. Jemmett, formerly general manager of the bank.

The grounds upon which the appellants resisted the attempt of the liquidator to make them contributories were as follows:—

(1) That the bank did not, within one year from the time of the passing of its Act of incorporation, procure a certificate of the Treasury Board authorising it to do business under the provisions of secs. 14 and 15 of the Bank Act, 53 Vict. ch. 31 (D.), being the Act in force at the time of the attempted incorporation of the bank; and, by reason of the failure of the bank to procure the certificate aforesaid, within the year following the passing of the Act of incorporation as aforesaid, that all rights, powers, and privileges conferred upon the bank by the Act ceased and determined and were of no force and effect; and that, therefore, the bank never was a legal bank; and these appellants were, therefore, never shareholders thereof by reason of the provisions of sec. 16 of the said Act; and that the certificate which was issued by the Treasury Board after the expiry of the year above-mentioned was and could be of no force and effect whatever.

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(2) That long before the 1st May, 1911, or at all events from and after that date, the bank had suspended payment in specie or Dominion notes; and that, therefore, the persons who proposed to transfer their shares to a company called "International Assets Limited" were liable to be settled upon the contributory list, under sec. 96 of 53 Vict. ch. 31 and sec. 130 of the Bank Act, R.S.C. 1906, ch. 29, and should be so settled and ordered to pay calls in ease of the appellants, either in place of or along with the International Assets Limited.

The solicitor for the appellants, in support of the application, for leave to examine Jemmett, made an affidavit, which was filed and in which he stated that the liquidator had been examined for discovery, and on his examination it appeared that he had no first-hand knowledge of the affairs and transactions of the bank prior to the 1st May, 1911, and was not fully informed as to the affairs and transactions of the bank after that date; that Jemmett was the general manager of the bank from some time in 1907 until the date of the winding-up order; that from information received upon the examination of the liquidator and from the deponent's investigation of the affairs of the bank, the deponent believed that the appellants could not safely proceed to the trial of the issues raised between them and the liquidator, on the contestation of the liquidator's attempt to place them upon the list of contributories, without the examination of the said Jemmett for discovery; that the transactions and proceedings of the bank from the date of the making of the agreement with the associated banks in January, 1908, down to the time when Mr. Clarkson was appointed curator and after, were all relevant and necessary to be examined and known by the appellants in the preparation of their cases, and no one but Jemmett was qualified, as the deponent believed, to give the information to which the appellants were entitled and which was necessary for their case; and that the application was made in good faith and not for delay or any improper purpose.

November 4. The appeal was heard by BORD, C., in the Weekly Court at Toronto.

*W. R. Smyth*, K.C., for the appellants.

*M. L. Gordon*, for the liquidator, respondent.

November 9. **Boyd, C.**—Section 117\* of the Winding-up Act, R.S.C. 1906, ch. 144, is copied from English legislation, and confers a special power, of inquisitorial character, intended to be used by the liquidator for his own guidance in the conduct of the liquidation. It has been spoken of by the English Judges as the means of conducting a preliminary inquiry for the information of the liquidator alone (Baggallay, L.J.); and that it is a compulsory proceeding for the purpose, not of taking evidence, but of getting information (Cotton, L.J.) It is also intimated that it is not to be used for the purpose of establishing a claim adverse to the liquidator, which would be contrary to its spirit and object: *In re Norwich Equitable Fire Insurance Co.* (1884), 27 Ch. D. 515, 521, 522.

The Legislature has provided, for contestants who litigate in the winding-up as to their rights and claims, that the procedure shall be as in ordinary civil proceedings in the Courts: sec. 108;† and that is a clear intimation that such a litigant is not also to have and be allowed to exercise the special and extraordinary powers of sec. 117: *In re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314. It is meant that the private litigant shall not, for the purpose of aiding his claim in the winding-up, have greater powers of investigation or a greater scope of discovery than he would have if he were proceeding in the Courts; he is not to be in a better position because of the winding-up.

Such cases, considered by themselves, would justify the conclusion of the Official Referee acting for the Court. But there is another line of cases which shew that in given circumstances there may be some defined right of discovery open to a contributory. They are referred to by Jessel, M.R., in *Whitworth's Case* (1881), 19 Ch. D. 118, 120. The liquidator here refuses to enter upon the examination proposed by the contesting contributories. It is for the Referee then to determine whether the right to examine should be entrusted to the applicants, to any extent, or with

\*117. The Court may, after it has made a winding-up order, summon before it or before any person named by it, any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, estate, or effects of the company.

†108. The proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action, or proceeding within the jurisdiction of the Court.

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what limitations. As said in the case cited, he knows more about the condition and facts of the case than the appellate Judge. I think, therefore, that he should consider the application in the view that the contributories may have a claim to invoke the aid of sec. 117: see *Re Penysflog Mining Co.* (1874), 30 L.T.R. 861.

The contributories seek to attack a transfer to the International Assets Company and an acquisition of a large number of shares in the bank by that company, as illegal, and to have the three shareholders who turned over their shares to the assets company placed on the list as contributories. It was said before me that this Assets company is able to meet all the calls made. If this is established as a preliminary, it may obviate or may postpone further proceedings now; or it may be made to appear to the Official Referee that the line of investigation proposed is unnecessary and vexatious, as was suggested before me. But these, and it may be other, aspects of the application, should be considered and dealt with by him.

No costs of appeal.

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June 12.  
Nov. 9.

[APPELLATE DIVISION.]

CAMPBELL V. DOUGLAS.

*Mortgage—Conveyance of Land Subject to—Obligation of Grantee to Assume and Pay—Consideration—Exchange of Lands—Vendor and Purchaser—Equitable Obligation of Purchaser—Conveyance not Made to Actual Purchaser—Parol Evidence to Shew Nature of Transaction—Admissibility—Mortgage—Conditional Sale.*

In this Province, the equitable obligation of the purchaser to indemnify the vendor when the amount of the mortgage is deducted from the purchase-price, and is in that sense retained by the purchaser, is clearly recognised; but the obligation arises only when the purchaser is actually one in fact. *Corby v. Gray* (1887), 15 O.R. 1, and *Walker v. Dickson* (1892), 20 A.R. 96, followed.

*Small v. Thompson* (1897), 28 S.C.R. 219, explained and distinguished.

In a deed of conveyance of land, executed by the plaintiff as grantor in favour of the defendant as grantee, the consideration stated was "an exchange of lands and one dollar;" the land was conveyed subject to certain mortgages, the description of which was followed by the words, "the assumption of which mortgages is part of the consideration herein." These incumbrances were not mentioned in the habendum, and there was no express covenant by the defendant to assume and pay them, nor did the defendant execute the deed:—

*Held*, that in the mention of these mortgages as "part of the consideration" the reference was to the exchange of lands; parol evidence was properly admitted to explain the circumstances and the extent and nature of the transaction called "an exchange of lands"—in an action brought by the grantor against the grantee to compel the latter to discharge the liability of

the grantor under the mortgages; and, it being shewn by the evidence so admitted that the deed was made to the defendant, not as a purchaser, but as the nominee of P., the real owner of the land exchanged for the land conveyed by the plaintiff, and that the mortgages were, by virtue of the agreement between P. and the plaintiff, to be assumed by P. as part of the consideration for the exchange, the action failed; *MAGEE, J.A.*, dissenting. In some cases, the frame of the deed may be such as to preclude the reception of evidence to contradict the consideration as expressed therein; but not so here.

Upon the evidence, the defendant treated the conveyance to him, not as vesting the estate in him for his own benefit, but as vesting it in him as mortgagee, subject to P.'s interest; the defendant never entered into possession except as agent for P., and in pleading disclaimed any interest as owner; the contract between P. and the defendant was not a contract of conditional sale, but of mortgage. Judgment of *LENNOX, J.*, reversed.

AN action to recover \$4,911.74 and interest as damages for the breach by the defendant of a covenant or obligation to pay off and discharge the plaintiff's liability under certain mortgages, as part of the consideration moving from the defendant upon an exchange of properties between the plaintiff and defendant.

The action was tried by *LENNOX, J.*, without a jury, at Ottawa.

*J. R. Osborne*, for the plaintiff.

*W. D. Hogg, K.C.*, for the defendant.

June 12. *LENNOX, J.*:—If this action is not distinguishable from *Walker v. Dickson* (1892), 20 A.R. 96, and if the *Walker* decision is not modified, or incidentally repealed by the judgment of the Supreme Court in *Small v. Thompson* (1897), 28 S.C.R. 219, my judgment should be for the defendant.

I think this action is clearly distinguishable in circumstances and principle from the *Walker* action and very closely resembles *Small v. Thompson*.

Douglas was not a mere nominee, and the plaintiff was not unconditionally bound to convey to him, and he only did so, as he stated, because he was a man of substance, and undertook by the conveyance to apply the consideration money retained in discharge of the plaintiff's obligation under the mortgages. It was an exchange of lands, practically an exchange of obligations, and the defendant reaps the full benefit of the obligations undertaken by the plaintiff. There was no instrument put in to shew, but it is probable, that the defendant held the land he released, at the time of the conveyance to the plaintiff, under the same form



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of speculative agreement set out in exhibits 4 and 6, and in terms, if not in law, had become the absolute owner. It is probable too that, as in the documents referred to, he took subject to mortgage incumbrances, and it may be that the time for re-purchase had elapsed. This is probability or possibility only, and I base nothing upon it. What is shewn clearly by what has been put in is, that Power was practically an agent of the defendant. I do not know whether, at the time of the conveyance, it was contemplated by Power and the defendant that the defendant would hold the properties conveyed to him as a security only—if it was, it was not known to the plaintiff. What is clear is, that the instrument defining the defendant's rights in these properties is dated long after the conveyance, the 1st October, 1913, and by it again the defendant takes subject to these mortgages; that it purports to be for an actual present advance of \$8,300, and in terms at all events the plaintiff was absolute owner before the writ in this action was issued.

There will be judgment for the plaintiff for \$4,911.74, with interest from the dates claimed, with costs, and a stay of execution for 15 days.

The defendant appealed from the judgment of LENNOX, J.

October 14. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

*W. D. Hogg*, K.C., for the appellant. It was clearly proved at the trial that the appellant, although mentioned as the vendee in the deed from the respondent of the lots, was not in fact the purchaser of the lands, but that the lands were held by him as security for his advances to one Power. In consequence, the appellant did not become liable for the mortgages against the lots at the time of the conveyance to him: *Walker v. Dickson*, 20 A.R. 96. The decision of the Supreme Court of Canada in *Small v. Thompson*, 28 S.C.R. 219, being based upon the fact that the respondent therein had retained possession of the property for a number of years, and that there was an express covenant in that case on the part of the purchaser to pay off the mortgages, is not applicable to the facts disclosed in this case. The learned Judge in the Court below erred in assuming that Power was the agent of the appellant. The case does not fall within the rule in *Waring*

v. *Ward* (1802), 7 Ves. 332, which decides that the purchaser of land subject to a mortgage assumes the liability of the mortgage and is bound in equity to pay it off. That decision is applicable only to the case of an actual purchaser of the land subject to the mortgage, which is not the case here. The presumption of liability on the part of the purchaser is always open to rebuttal, and the evidence in this case clearly shews that the presumption has been rebutted: *Corby v. Gray* (1887), 15 O.R. 1. The deed in question is not the whole transaction.

*J. R. Osborne*, for the plaintiff, respondent. The appellant was not a mere nominee. The respondent conveyed to him only because he was a man of substance. The terms of the deed amounted to a covenant by the appellant to pay the mortgage, the assumption of which was declared to form part of the consideration for the grant of the land. The case is within the decision in *Walker v. Dickson*, already referred to. The contract amounted to a conditional sale: *Mellor v. Lees* (1742), 2 Atk. 494; *Goodman v. Grierson* (1813), 2 B. & B. 274.

*Hogg*, in reply.

November 9. HODGINS, J.A.:—If in this action regard was had only to the form of the deed between the parties, the judgment would have been unimpeachable. But the deed in question is not the whole transaction. Evidence was admitted, and properly so, to shew the circumstances out of which the giving of the deed arose, and effect should be given to it: *Mills v. United Counties Bank Limited*, [1912] 1 Ch. 231. The date of the deed is the 15th January, 1913, and the consideration stated in it is "an exchange of lands and one dollar." It conveys lands on Lisgar street in Ottawa, subject to certain mortgages, the description of which is followed by the words, "the assumption of which mortgages is part of the consideration herein." The habendum does not mention these incumbrances, and there is no express covenant by the appellant to assume and pay them, nor did he sign the deed. The assumption of these mortgages as "part of the consideration" evidently refers to the exchange of lands, which is the only portion of the named consideration set forth, in which the assumption of the mortgages could be comprehended. This is not a case of such precise expression of a consideration as would preclude the admission of parol evidence to explain the full

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extent and nature thereof arising out of the transaction called "an exchange of lands:" Norton on Deeds, 2nd ed., pp. 201, 205; *Rex v. Inhabitants of Llangunnor* (1831), 2 B. & Ad. 616.

When the evidence is considered, it is clear that the deed was made to the appellant, not as a purchaser, but as the nominee of the purchaser, and that the mortgages were, by virtue of the contract between Power, the real owner of the lands in question, and the respondent, to be assumed by Power as part of the consideration for the exchange of lands owned by the respondent. This satisfies the terms of the deed and is not contradictory of it. There is no covenant by the appellant to pay these mortgages, nor to indemnify the respondent against them, but the respondent stands upon the deed as containing a contract with the appellant that the latter would "assume, pay, and discharge" the said mortgages. This is not the true effect of the agreement referred to nor of the deed in question as explained thereby.

Unless there be an express agreement, any liability would, *primâ facie*, be upon an equitable obligation which arises from the relationship of vendor and purchaser—a position which is not established here.

The cases of *Corby v. Gray*, 15 O.R. 1, and *Walker v. Dickson*, 20 A.R. 96, are not in real conflict with *Small v. Thompson*, 28 S.C.R. 219. In that case there was an express covenant to pay the mortgage and to indemnify, and it was recited as part of the consideration that Mrs. Thompson was to assume the obligation to pay the mortgage-debt. She did not execute the deed, but took possession of the lands and enjoyed the profits therefrom until the mortgagees entered. The Court held that Mrs. Thompson, with knowledge, adopted the deed, and, in assenting to take under it, bound herself by the undertakings expressed in it, to be performed by her. The decision, in my judgment, means that Mrs. Thompson was in fact the purchaser, and, being so, she, though not signing the deed, adopted it, and thereby became liable upon the covenant contained therein to the extent of her separate estate. Here, before action, the appellant treated the conveyance to him, not as vesting the estate in him for his own benefit, but as vesting it in him as mortgagee, subject to Power's interest. He never entered into possession, except as agent for Power, and in his defence he disclaims any interest as owner, a

fact which removes from this case an element deemed decisive in *Small v. Thompson*, where the pleadings were viewed as adopting the conveyance of the property to the defendant.

While, in this Province, the equitable obligation of the purchaser to indemnify the vendor when the amount of the mortgage is deducted from the purchase-price, and is in that sense retained by the purchaser, is clearly recognised, it is well settled by the cases first cited that that obligation arises only when the purchaser is actually one in fact. It is of course true that in some cases the frame of the deed may be such as to preclude the reception of evidence to contradict the consideration as expressed therein, but this is not, in my opinion, such a case.

Upon the argument it was urged that the contract between Power and the appellant was a conditional sale, and not a mortgage, and some cases were cited upon that point.

These depend entirely upon the various transactions therein set out, one important element being a dealing by the conditional purchaser with the property and the possession thereof such as precluded the Court from holding that the relation of mortgagor and mortgagee ever subsisted. Here the genesis of the dealing was an advance of money, so designated, and possession was not proved to have been taken by the appellant. He collected the rents and profits after the 1st October, 1914, but only at Power's request, and applied them upon moneys due by Power to a company of which the appellant was manager. The forfeiture of Power's interest in the property in question, if the transaction was in reality a mortgage, would not be effective. The appellant expressly disclaims taking advantage of it, and on the 1st October, 1913, a re-arrangement of the indebtedness covered by the original agreement was made, which recognised the right of Power to one of the properties affected by the so-called forfeiture.

I think the appeal should be allowed and the judgment reversed with costs throughout.

MEREDITH, C.J.O., and GARROW and MACLAREN, JJ.A., concurred.

MAGEE, J.A.:—In this case the terms of the deed from the plaintiff to the defendants amounted, in my opinion, to a covenant

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by the defendant to pay the mortgage "the assumption" of which was declared to form part of the consideration for the grant of the lands: *Re Cadogan and Hans Place Estate Limited* (1895), 73 L.T.R. 387, at p. 390; *Great Northern R.W. Co. v. Harrison* (1852), 12 C.B. 576, 609; *Farrall v. Hilditch* (1859), 5 C.B.N.S. 840, 854. From that covenant the defendant could not get relief except upon the ground of mistake. The circumstances do not shew any ground for such relief. The plaintiff, granting the land, was entitled to have the covenant of the grantee or some one satisfactory to himself. There is no evidence, and it is extremely improbable, that he would have granted the land to the defendant and accepted the covenant of Power, who would thus be deprived of the very asset which would enable him or better enable him to fulfil it. The defendant here is in effect seeking reformation without offering to substitute any other security to the plaintiff.

In my view, the judgment should be affirmed.

*Appeal allowed; MAGEE, J.A., dissenting.*

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[APPELLATE DIVISION.]

LUTTRELL v. KURTZ.

*Division Courts—Jurisdiction—Title to Land—Action to Recover Sale-deposit—Title Defective owing to Breach of Restrictive Building Covenant—Division Courts Act, R.S.O. 1914, ch. 63, sec. 61 (a)—Appeal—Evidence not Certified—Secs. 127, 128.*

Where an action for the return of a sum of money paid by the purchaser to the vendor, as a deposit upon a contract for the sale and purchase of land, involves the question of the possession, at the date of the contract or trial, of either a good or defective title to the land in the defendant, a Division Court has no jurisdiction: sec. 61 (a) of the Division Courts Act, R.S.O. 1914, ch. 63.

*Seemle*, that the question whether or not a restrictive building covenant has ceased to bind the land is one of difficulty, and it should not, even if there were jurisdiction, be determined in a Division Court.

*Elliston v. Reacher*, [1908] 2 Ch. 374, 384, referred to.

Upon appeal from the judgment of a Division Court, the appellate Court cannot decide whether the judgment is right without the evidence taken by the Judge in the Division Court being before it (secs. 127 and 128). Its place might possibly be taken by the certificate of the Judge as to what was proved before him, but not by a statement of facts agreed upon by the parties, which may or may not have been what he acted upon.

Judgment of the First Division Court in the County of York reversed.

APPEAL by the defendant from the judgment of the First Division Court in the County of York in favour of the plaintiff

in an action for the return of the sum of \$100 paid by the plaintiff to the defendant as a purchaser's deposit upon a contract for the purchase of land from the defendant.

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October 6. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*G. T. Walsh*, for the appellant, referred to *Child v. Douglas* (1854), 1 Kay 560; *Manners v. Johnson* (1875), 1 Ch. D. 673, 678; *Re Masonic Temple Co. and City of Toronto* (1915), 33 O.L.R. 497; *Forster v. Elvet Colliery Co.*, [1908] 1 K.B. 629; *London County Council v. Illuminated Advertisements Co.*, [1904] 2 K.B. 886; *London County Council v. Schewzik*, [1905] 2 K.B. 695; *London County Council v. Hancock & James*, [1907] 2 K.B. 45; *Knight v. Simmonds*, [1896] 2 Ch. 294.

*G. Keogh*, for the plaintiff, the respondent, referred to the Am. & Eng. Encyc. of Law, 2nd ed., vol. 5, p. 7, and cases there cited.

November 9. The judgment of the Court was delivered by HODGINS, J.A.:—I think this appeal should be allowed and the action dismissed, upon two grounds: first, that the Division Court had no jurisdiction to try the case; and, second, that there is no evidence certified to the Court as provided by sec. 127. of the Division Courts Act, R.S.O. 1914, ch. 63.

The Division Court is expressly deprived of jurisdiction by sec. 61 of that Act, which provides: "The Court shall not have jurisdiction in (a) an action for the recovery of land, or an action in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question."

This action is for the return of a deposit of \$100, upon the ground that the defendant's title to certain lands is defective owing to a breach of a restrictive building covenant preventing a user of the land by the erection of a building of certain material and character nearer than fifteen feet to the street-line.

The question which the learned Judge in the Division Court had to decide was, whether or not that covenant affected the land, and, if so, whether it had been broken, and whether that breach rendered the title defective.

In view of the difficulties always surrounding the question of whether such a covenant has ceased to bind the land (as to which see *Elliston v. Reacher*, [1908] 2 Ch. 374, at p. 384), it would seem

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to me inadvisable that such an action as the present should be determined in the Division Court. That Court is a Court of record (ch. 63, sec. 8); and if, after a decision either way, one of the parties should sue for specific performance or rescission, he would, if jurisdiction existed, be bound by the judgment.

But the Court has not, in my opinion, any right to decide upon whether the deposit must be returned, if the basis of decision involves the question of the possession, at the date of the contract or trial, of either a good or a defective title in the defendant.

Dealing with the second ground, this Court is called upon to decide whether the judgment is right without the evidence taken by the learned Judge being before it. Its place might possibly be taken by his certificate of what was proved before him, but not by a statement of facts agreed upon by the parties, which may or may not have been what he acted upon.

There is no provision for taking down the evidence by the Judge in cases where \$100 or less is in controversy. But there is nothing which enables this Court to become seized of the appeal unless sec. 127 has been complied with (see sec. 128, sub-sec. 2).\*

Where evidence is taken, sec. 127 could not be satisfied without its being certified. This has not been done here; and, if the parties have allowed the case to proceed without taking precautions to see that the evidence can be included, they have themselves to blame.

Under the circumstances there should be no costs.

\*127. The clerk shall, at the request of the appellant or his agent, certify under his hand to the Clerk of the Central Office at Osgoode Hall, Toronto, the summons with all notices indorsed thereon, the claim, and any notice of defence, *the evidence* and all objections and exceptions thereto, and all motions or orders made, granted, or refused therein, together with such notes of the Judge's charge as may have been made, the decision when in writing, or the notes thereof, and all affidavits and other papers in the action, the whole hereinafter called the appeal case;

128.—(1) The appellant shall, within two weeks after the date of the decision complained of or within such other time as the Judge may order, file the appeal case with the proper officer of the Supreme Court, and shall set down the appeal to be heard at the latest two clear days before the first sittings of a Divisional Court which commences after the expiration of thirty days from the decision complained of, and shall give notice thereof and of the appeal, stating the grounds thereof, to the respondent, his solicitor or agent, at least seven days before the commencement of such sittings;

(2) The Divisional Court shall be deemed to be seized of the appeal if and when the appeal case is filed; and, subject to Rules of the Court, may extend the time for setting down the appeal and for giving notice thereof, and of the appeal, and for doing any act or taking any proceeding in or in relation to the appeal; and may, if the appeal case is incomplete or inaccurate, direct the same to be amended or to be sent back to the clerk for amendment; and may also allow the notice of appeal to be amended.

## [APPELLATE DIVISION].

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## REX v. TORONTO R. W. CO.

*Criminal Law—Common Nuisance—Street Railway—Overcrowding of Cars—Criminal Code, R.S.C. 1906, ch. 146, secs. 221, 222, 223—Interpretation Act, R.S.C. 1906, ch. 1, sec. 28—Ontario Railway Act, R.S.O. 1914, ch. 185, secs. 163, 169 (i)—Indictment—Conviction—"Indictable Offence"—Punishment—Abatement—"Public Nuisance"—Injury Confined to Passengers—Systematic Overcrowding—Nuisance Continuing at Time of Indictment—Right to Limit Number of Passengers to be Carried in Car.*

Upon a case stated by RIDDELL, J., the conviction of the Toronto Railway Company, upon the verdict of a jury, upon an indictment for a common nuisance in overcrowding its cars, and thereby endangering the property and comfort of the passengers, was affirmed, and the reasons of RIDDELL, J. (*Rex v. Toronto R.W. Co.* (1911), 23 O.L.R. 186), approved.

Sections 221, 222, and 223 of the Criminal Code, R.S.C. 1906, ch. 146, sec. 28 of the Interpretation Act, R.S.C. 1906, ch. 1, and secs. 163 and 169 (i) of the Ontario Railway Act, R.S.O. 1914, ch. 185, considered.

Section 223 of the Code leaves untouched the common law right to proceed by indictment or information, which are the only modes by which a prosecution for a public nuisance can take place, but prevents persons convicted of the nuisances to which that section applies from being punished, as they might be according to the common law, by fine or imprisonment, and limits the proceedings after a conviction to the other remedy which the law provides—the abatement of the nuisance if it continues to exist.

An "indictable offence," as that term is used in the Code, is a criminal offence. The overcrowding of the company's cars constituted a public or common nuisance, notwithstanding that it affected only those who became passengers in the cars, and not all of the public. What the evidence disclosed was not an isolated case of overcrowding, but a systematic course of conduct persisted in and apparently deliberately adopted by the company, and at certain hours of the day and on certain of the company's lines affecting all who had become passengers on the cars.

Review of the authorities.

Judgment for the abatement of it on a conviction for a public nuisance cannot be given unless the nuisance continues at the time of the indictment; in this case the continuance was sufficiently alleged in the indictment and shewn by the evidence.

*Semble*, that in the judgment of the Court requiring that the nuisance be abated the company would have as ample authority for limiting the number of passengers to be carried in a car as would be afforded by an order of the Ontario Railway and Municipal Board.

CASE stated by RIDDELL, J., before whom, upon the verdict of a jury, the defendant company was, on the 3rd February, 1911, convicted of a common nuisance.

See *Rex v. Toronto R. W. Co.* (1911), 23 O.L.R. 186, where the facts are stated.

October 12 and 13. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

H. H. Dewart, K.C., and D. L. McCarthy, K.C., for the defendant company, after a reference to the arguments adduced by



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counsel for the defendant company at the trial, which are considered and fully dealt with in the reasons for judgment of the learned trial Judge, 23 O.L.R. 186, said that the appeal narrowed down to a consideration of count 6A of the indictment, and they contended that it did not disclose any indictable offence. It did not charge the defendant company with committing a nuisance. Even if it had done so, it would not have been sufficient, as it should have charged the commission of a public or common nuisance. It was not charged that what the defendant company had done amounted to a public or common nuisance. It could not be such, because the overcrowding did not affect the whole public, but only those members of the public who were passengers in the defendant company's cars. They referred to secs. 231, 232, 247, 283, and 284 of the Criminal Code. There is no authority which shews that overcrowding constitutes a nuisance: *National Telephone Co. v. Baker*, [1893] 2 Ch. 186. In all the railway company had done it was conforming to the order of the Railway Board, and it had committed no breach of legal duty: *The Queen v. Hall*, [1891] 1 Q.B. 747. As to the prevention of overcrowding, the company had no power to use physical force to attain this object. There were no by-laws of the company covering this matter, and any such by-laws would require to be sanctioned by the Railway Board. As the English statutes on this subject differ from ours, the English authorities on this point are inapplicable: *Haines v. Grand Trunk R.W. Co.* (1913), 29 O.L.R. 558; *Butler v. Manchester Sheffield and Lincolnshire R.W. Co.* (1888), 21 Q.B.D. 207; Macnamara's Law of Carriers by Land, 2nd ed., pp. 561-564. Judgment for abatement could not be had when the nuisance did not continue.

*J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown, relied upon the reasons for judgment of Mr. Justice Riddell in the Court below. In regard to the contention that no crime was disclosed by count 6A, counsel argued that they were not limited to sec. 223 of the Code, but could and did rely upon the common law, and they referred to Halsbury's Laws of England, vol. 21, p. 511; Archbold's Criminal Pleading, 23rd ed., pp. 305 and 306. The offence set forth in count 6A was properly indictable and punishable as a crime: Archbold's Criminal Pleading, 24th ed., p. 1.

It was not intended by sec. 223 of the Code that only nuisances such as described in sec. 222 should be criminal offences. The acts complained of in count 6A constituted a public or common nuisance, even though they affected only the passengers, and not the whole public: Russell on Crimes and Misdemeanours, 7th ed., p. 1857; Archbold's Criminal Pleading, 24th ed., p. 1311. The evidence shewed that the overcrowding was not an isolated case, but a custom of the defendant company. Judgment for abatement was correct, because the nuisance continued at the time of the indictment. The defendant company had power to make rules and pass by-laws to prevent overcrowding, and to use physical force to prevent it if need be, and there would be no difficulty in obtaining the sanction of the Railway Board thereto.

*Dewart*, in reply, urged that no duty was imposed upon the defendant company to pass a by-law to prevent overcrowding.

November 9. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is a case stated by Riddell, J., before whom the defendant was convicted at the sittings at Toronto on the 3rd February, 1911, of a common nuisance: *Rex v. Toronto R.W. Co.*, 23 O.L.R. 186.

The indictment contains several counts, only one of which, count 6A, is in question, as the defendant was convicted on that count only, the jury having failed to agree upon a verdict as to the other counts.

Count 6A is as follows: "6A. And the jurors aforesaid do further present that the said Toronto Railway Company operating cars as in the preceding count of this indictment set out were under a legal duty to carry those subjects of our Lord the King received by the said company as passengers on the said cars in such a manner as to avoid endangering the property and comfort of such passengers, and that the said Toronto Railway Company, at the city of Toronto aforesaid, and during the time in the preceding count set out, without lawful excuse, unlawfully neglected and unlawfully omitted to take reasonable precautions to avoid endangering the property and comfort of such passengers by neglecting and omitting to take any reasonable precautions or care to prevent undue, dangerous, and illegal overcrowding of passengers in such cars, in consequence whereof the property and comfort of the public and of the subjects of our Sovereign Lord the King,

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passengers on the said cars as aforesaid, were endangered, and the said Toronto Railway Company did thereby commit an indictable offence contrary to the provisions of the Criminal Code and against the peace of our Sovereign Lord the King, his crown and dignity."

Section 221 of the Criminal Code defines what is a common nuisance, and its provision is that "a common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects."

By sec. 222 it is provided that "every one is guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual."

By sec. 223 it is provided that "any one convicted upon any indictment or information for any common nuisance other than those mentioned in the last preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right."

All of the objections urged by the learned counsel for the defendant, except perhaps one, were dealt with by the learned trial Judge in an elaborate statement of his reasons for judgment with which I entirely agree and to which I have but little to add.

In addition to the reasons which are given for holding that the defendant had omitted to discharge a legal duty, I may refer to the power which the defendant has under what is now sec. 163 of the Ontario Railway Act (R.S.O. 1914, ch. 185). That section confers upon railway companies the power to make by-laws, rules and regulations respecting "the number of passengers to be allowed in cars, their mode of entrance or exit, and the portion of the car or the class of car to be occupied by them" (clause i); and by sec. 169 it is provided that, "if the contravention or non-observance of any by-law, rule or regulation is attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, the company may summarily

interfere, using reasonable force, if necessary, to prevent such violation, or to enforce observance, without prejudice to any penalty incurred in respect of such violation or non-observance."

It is true that such a by-law requires the approval of the Ontario Railway and Municipal Board before it can take effect; but no such by-law appears to have been passed; and, therefore, no attempt has been made to obtain the power which it would confer. I do not wish, however, to be understood to mean that I think that without such by-law the defendant would not have the powers mentioned in clause (i); on the contrary, I entirely agree with the view expressed by the trial Judge.

I am unable to agree with the contention of counsel for the defendant that what is stated in count 6A to have been done is not indictable and punishable as a crime.

Sections 221, 222, and 223 are identical with secs. 150, 151, and 152 of the draft Code prepared by the Royal Commission appointed in 1878 to consider the law relating to indictable offences, and in their report the Commissioners say:—

"With regard to nuisances . . . we have in sections 151 and 152 drawn a line between such nuisances as are and such as are not to be regarded as criminal offences. It seems to us anomalous and objectionable upon all grounds that the law should in any way countenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in good faith. Nuisances which endanger the life, safety or health of the public stand on a different footing.

"By the present law, where a civil right such as a right of way is claimed by one private person and denied by another, the mode to try the question is by an action. But, when the right is claimed by the public, who are not competent to bring an action, the only mode of trying the question is by an indictment or information which is in form the same as an indictment or information for a crime. But it was very early determined that, though it was in form a prosecution for a crime, yet that, as it involved a remedy for a civil right, the Crown's pardon could not be pleaded in bar: see 3 Inst. 237; and the Legislature, so recently as in the statute 40 & 41 Vict. ch. 14, again recognised the distinction. The existing remedy in such a case is not convenient, but it is not within our province to suggest any amendment."

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"An 'indictment' is a written accusation of crime, made at the suit of the King, against one or more persons, and preferred to, and presented upon oath by, a grand jury: "Archbold's Criminal Pleading, 24th ed., p. 1. An information lies at common law for misdemeanours only, and an information *ex officio* is a "formal written suggestion on behalf of the King of a misdemeanour committed, filed by the King's Attorney-General (or, in the vacancy of that office, by the Solicitor-General):" *ib.*, p. 147. In England an information may also be laid by the Master of the King's Bench, and is a formal written suggestion of a misdemeanour committed, filed in the King's Bench Division of the High Court of Justice at the instance of a private individual, with the leave of the Court, by the Master of the Crown Office (King's coroner and attorney) without the intervention of a grand jury: *ib.*, p. 150.

It is, I think, manifest from all this that it was intended by sec. 152 to leave untouched the common law right to proceed by indictment or information, which are the only modes by which a prosecution for a public nuisance can take place, but to prevent persons convicted of the nuisances to which that section applies from being punished, as they might be according to the common law, by fine or imprisonment, and to limit the proceedings after a conviction to the other remedy which the law provided—the abatement of the nuisance if it continued to exist; and that, in my opinion, is the effect of sec. 223 of our Criminal Code.

This conclusion is strengthened by the provisions of sec. 28 of the Interpretation Act, R.S.C. 1906, ch. 1, which provides that, "every Act shall be read and construed as if any offence for which the offender may be (a) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence."

As there can, I think, be no doubt that an "indictable offence," as that term is used in the Canadian Criminal Code, is a criminal offence, I cannot conceive that Parliament would have fallen into the mistake of legislating as to matters which were not intended to be crimes, or of supposing that there could be a conviction upon an indictment for a nuisance unless the committing of it were a crime.

If it had been intended that the common law should be so

changed as that only nuisances of the kind described in sec. 222 should be criminal offences, one would have expected that nothing would have been said as to "conviction upon any indictment," but the section would have provided simply that nuisances other than those mentioned in sec. 222 should be criminal offences.

The question which I have spoken of as perhaps not dealt with by the learned trial Judge, but raised upon the argument before us, was, whether the overcrowding of the cars constituted a public or common nuisance—the contention being that to constitute such a nuisance the act complained of must have affected all of the public; and that, as the overcrowding affected only those who had become passengers in the defendant's cars, the defendant's acts were not *ad commune nocumentum*. I am unable to agree with that contention.

In the case of a nuisance on a public highway it is only those who have occasion to use the highway that are prejudicially affected by the existence of the nuisance, and yet the nuisance is undoubtedly a public one; and so in the case at bar, though it is only those who become passengers in the defendant's cars that are prejudicially affected by what is complained of, the nuisance is a public one. Just as all the public may use the highway, though all may not have occasion to use it, all for whom there is room in the cars have the right to travel in them, though all the public may not desire or have occasion to do so.

The fact that only those of the public who pay the lawful fare to which the defendant is entitled have the right to travel in the cars can make no difference; for, if that were a valid objection in this case, it would be equally so in the case of a turnpike road, which cannot be used by the travelling public except upon payment of a toll, and in the case of toll-roads owned by road companies and by municipal corporations, of which there were many in earlier days, and yet there can be no doubt that such roads do not differ as respects the consequences of failure to keep them in repair from roads that are not toll-roads. The English Turnpike Act of 1822 assumes that that is the case, for it provides for the apportionment of fines imposed where the inhabitants of a parish . . . are indicted for not repairing any highway, being a turnpike road; and in *Macdonald v. Hamilton and Port Dover Plank Road Co.* (1853), 3 U.C.C.P. 402, the

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Court appears to have been of opinion that want of repair of the defendants' road would have been a "public nuisance as respects the public at large;" and I gather from the report of the case that the contention of the defendants was that they were not liable to an action by an individual who had suffered damage by reason of their failure to keep the road in repair, and that the only remedy was by indictment for a public nuisance.

In *Williams v. East India Co.* (1802), 3 East 192, 200, 201, the action was to recover damages for injury to a ship which was chartered by the defendants, caused by a dangerous combustible commodity which the defendants had put on board without due notice to the captain or any person employed in the navigation of the ship of its dangerous nature, and Lord Ellenborough, delivering the judgment of the Court, said "that the declaration, in imputing to the defendants the having wrongfully put on board a ship, without notice to those concerned in the management of the ship, an article of a highly dangerous combustible nature, imputes to the defendants a criminal negligence, cannot well be questioned. In order to make the putting on board wrongful, the defendants must be conscious of the dangerous quality of the article put on board; and if being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanour at least."

I cite this case to shew that, though the danger was caused only to those who were on board the ship the defendants had committed a common nuisance, for that I understand to be the misdemeanour which Lord Ellenborough said they were liable to punishment for, and it is so treated in Russell on Crimes, 7th ed., p. 1857, and in Archbold's Criminal Pleading, 24th ed., p. 1311.

The case of *Williams v. East India Co.* and what was said by Lord Ellenborough in *Rex v. Allen* (1803), 4 Esp. 200, and by Stephen, J., in *The Queen v. Price* (1884), 12 Q.B.D. 247, warrant the conclusion that the acts complained of in count 6A constituted a public nuisance, although it was only those of the public who became passengers in the defendant's cars whose property and comfort were endangered.

In *Rex v. Allen*, 4 Esp. 200, the prisoner was a tinman, and was indicted for a nuisance which consisted of making so much noise in carrying on his business that the prosecutors were disturbed in the occupation of their chambers in Clifford's Inn and from carrying on their lawful professions. Lord Ellenborough, before whom the case was tried, ruled that upon the evidence the indictment could not be sustained, and that it was, if anything, a private nuisance, and said: "It was confined to the inhabitants of three numbers of Clifford's Inn only; it did not even extend to the rest of the Society, and could be avoided by shutting the windows; it was not therefore of sufficient general extent to support an indictment; and he thought this indictment had been already carried on far enough."

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In *The Queen v. Price*, 12 Q.B.D. 247, the prisoner was indicted for attempting to burn the body of his child instead of burying it, and for attempting to burn the body with intent to prevent the holding of an inquest upon it; and in charging the grand jury Stephen, J., said (p. 256): "A common nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. To burn a dead body in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go is beyond all doubt a nuisance, as nothing more offensive both to sight and to smell can be imagined. The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but if you think upon inquiry that there is evidence of its having been done in such a situation and manner as to be offensive to any considerable number of persons, you should find a true bill." And, true bills having been found, the learned Judge directed the jury in the terms of his charge to the grand jury.

Applying the test which Stephen, J., directed to be applied, viz., whether what the defendant is alleged to have done was done in such a situation and manner as to be offensive to any considerable number of persons, I can have no doubt that the defendant was charged with and convicted of having committed a public nuisance. What the evidence disclosed was not an isolated case of overcrowding, but a systematic course of conduct persisted in and apparently deliberately adopted by the defendant,



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and at certain hours of the day and on certain of the defendant's lines affecting all who had become passengers on the cars,

Judgment for the abatement of it on a conviction for a public nuisance cannot be given unless the nuisance continues at the time of the indictment; and at first sight I thought that that might be a fatal objection to the conviction in this case; but, on looking more closely at the indictment, I find that count 6A alleges that the nuisance was continuing at the time of the indictment. The allegation is, that the acts complained of were committed "during the time set out in the preceding count;" and, on referring to count 5, to which the reference is carried by count 6, the time is stated to be "in the year of our Lord one thousand nine hundred and ten and in the year of our Lord one thousand nine hundred and eleven down to the date of the finding of this indictment."

I would affirm the conviction.

In parting with the case I venture to express the hope that our decision may result in putting a stop to overcrowding. It was stated on the argument that the defendant was anxious to get rid of the overcrowding, and had, with that object in view, endeavoured to get the Corporation of Toronto to join in an application to the Ontario Railway and Municipal Board to limit the number of passengers to be carried in a car. If the defendant is of the same mind now, it will have, in the judgment of the Court requiring that the nuisance be abated, as ample authority to grapple with the evil as the proposed order would have given, if such an order were necessary to enable the defendant to grapple with it.

*Conviction affirmed.*

## [APPELLATE DIVISION.]

1915

Nov. 9.

## RE ROSS AND HAMILTON GRIMSBY AND BEAMSVILLE R. W. CO.

*Railway*—"Branch Line or Railway"—*Dominion Railway Act, 1888, 51 Vict. ch. 29, sec. 306*—*Construction*—*Provincial Railway Crossing Dominion Railway—Work for the General Advantage of Canada—Legislative Authority—Jurisdiction of Ontario Railway and Municipal Board.*

By sec. 306 of the Dominion Railway Act of 1888, 51 Vict. ch. 29, certain named railways were declared to be works for the general advantage of Canada; "and," the section continued, "each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada:"—

*Held*, that the word "branch," which qualifies the word "line," in the part of the section quoted, also qualifies the word "railway" which immediately follows; and, therefore, sec. 306 affects only the named railways and their branch lines.

The Hamilton Grimsby and Beamsville Railway, an electric railway which now crosses one of the railways named in sec. 306, has not, therefore, come under the legislative authority of the Parliament of Canada, but is subject to the legislative authority of the Legislature of Ontario, by which the company was incorporated, and to the authority of the Ontario Railway and Municipal Board.

Sections 3, 4, 6A (added by sec. 1 of 63 & 64 Vict. ch. 23), 173, 177, 306, and 307 of 51 Vict. ch. 29, considered.

APPEAL by the railway company from an order of the Ontario Railway and Municipal Board, dated the 10th May, 1915, requiring the company to provide certain sanitary conveniences on its cars.

The railway company was incorporated by an Act of the Legislature of Ontario; but its railway crossed one of the railways named in sec. 306 of the Dominion Railway Act of 1888, 51 Vict. ch. 29; and the sole question upon the appeal was, whether the railway had been thus declared to be a work for the general advantage of Canada, and so not subject to the authority of the Legislature of Ontario nor to that of the Ontario Railway and Municipal Board.

October 12. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*I. F. Hellmuth, K.C., and G. H. Levy*, for the appellant company. The order is *ultra vires* of the Railway Board, as the railway has been declared to be a work for the general advantage of Canada. The appellant company's line crosses one of the railways named in sec. 306 of the Dominion Railway Act, 51 Vict. ch. 29, and so its railway has become subject to the exclusive jurisdiction

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of the Canadian Parliament. The words "every branch line or railway" in sec. 306 cover not only branch lines of the railways mentioned in the section, but all other branch lines or railways so crossing. The opening words of sec. 307, "Every such railway and branch line," shew this to be the meaning. The amendment made to sec. 173 by 56 Vict. ch. 27, and the addition made to the Act of 51 Vict. by ch. 1 of 63 & 64 Vict. ch. 23, sustain our contention. The railway having once come under the legislative authority of the Parliament of Canada, it was beyond the power of that Parliament to hand it over to the jurisdiction of the Provincial Legislature: *Attorney-General for Alberta v. Attorney-General for Canada*, [1915] A.C. 363; *Grand Trunk R.W. Co. v. Hamilton Radial Electric R.W. Co.* (1897), 29 O.R. 143; *Rex v. Canadian Pacific R.W. Co.* (1914-5), 33 O.L.R. 248; *Canadian Pacific R.W. Co. v. The King* (1907), 39 S.C.R. 476; *Attorney-General for Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia*, [1898] A.C. 700, at p. 715.

*J. R. Cartwright*, K.C., and *Edward Bayly*, K.C., for the Attorney-General for Ontario and the Ontario Railway and Municipal Board. The appellant company's railway never came under the legislative authority of the Parliament of Canada; it is not within the provisions of sec. 306 of 51 Vict. ch. 29. In that section, the only branch lines referred to are branch lines of the railways mentioned in the section. At all events, the section would not include street or electric railways. Otherwise there would not have been any necessity for enacting sec. 177. The amendments referred to by counsel for the appellant company do not help their contentions.

*Hellmuth*, in reply.

November 9. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the railway company from an order of the Ontario Railway and Municipal Board, dated the 10th May, 1915, requiring the company to provide certain sanitary convenience on its cars; and the sole question is as to the jurisdiction of the Board to make any order affecting the company, it being contended by the appellant, which obtained its Act of incorporation from the Provincial Legislature, that its railway has been declared to be a work for the general advantage of Canada, and is therefore not subject to the legislative authority

of the Legislature of this Province nor to the authority of the Board which it has constituted by its Railway Act.

Two questions only were argued:—

(1) Whether the railway ever came under the legislative authority of the Parliament of Canada by having been declared to be a work for the general advantage of Canada.

(2) Whether, if it had so come, it was competent for the Parliament of Canada to repeal the Act which brought the railway under its exclusive jurisdiction.

As I have come to the conclusion that the first question should be answered in the negative, it will not be necessary to determine the second question.

The contention of the appellant is that, as its line now crosses one of the railways named in sec. 306 of the Railway Act, 51 Vict. ch. 29 (Canada), its railway, although, when that Act was passed, it had not been built and had not even been authorised to be constructed, became, when it crosses, as it does, one of those railways, by force of that section, subject to the exclusive legislative authority of the Parliament of Canada.

It appears to me that it was highly improbable that the Parliament of Canada, by a sweeping declaration such as it is contended sec. 306 contains, would have brought under its provisions every railway which should happen in the future to cross one of the named railways, however local in its nature it might be, and regardless of its character or the objects it was designed to serve; and a construction which would give to the section that effect ought not to be adopted unless the intention is clearly and unmistakably expressed.

It was not unreasonable that branch lines of the named railways, though not then built or projected, should, when constructed, if they crossed the main railway, come under the same legislative jurisdiction as the main railway was under; and, in my opinion, sec. 306 should be read as meaning this and no more.

Section 306 reads as follows: "306. The Intercolonial Railway, the Grand Trunk Railway, the North Shore Railway, the Northern Railway, the Hamilton and North-Western Railway, the Canada Southern Railway, the Great Western Railway, the Credit Valley Railway, the Ontario and Quebec Railway, and the Canadian Pacific Railway, are hereby declared to be works for the

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general advantage of Canada, and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada."

In my opinion, the word "branch," which qualifies the word "line" in the latter part of the section, also qualifies the word "railway" which immediately follows. That is the grammatical construction which the language bears, and is a construction which makes the enactment a more reasonable one than it would be if it has the meaning which the appellant contends should be given to it.

It was argued by counsel for the appellant that the opening words of sec. 307—"Every such railway and branch line"—shew that the word "railway" was not used in the limited sense which I think it has; but, instead of helping the appellant's case, they, in my opinion, have the opposite effect, because, as I think, the draftsman, in using the words "such railway," had reference to the railways named in sec. 306, and, so reading them, the use of the words "branch lines" strengthens the view that that sec. 306 was intended to affect only the named railways and their branch lines.

If it were otherwise, I do not understand why sec. 177 was enacted. It provides that "every railway company incorporated by any Act of the Legislature of any Province which crosses, intersects, joins or unites with any railway within the legislative authority of the Parliament of Canada, or which is crossed, or intersected by, or joined or united with any such railway shall, in respect of such crossing, intersection, junction and union, and all matters preliminary or incident thereto, be deemed to be, and be, within the legislative authority of the Parliament of Canada, and subject in respect thereof to the provisions of this Act."

The section was quite unnecessary if the effect for which the appellant contends is given to sec. 306, for in that case the railways with which sec. 177 deals are subject to the exclusive legislative authority of the Parliament of Canada, not merely for crossing purposes but for all purposes; and, reading the two sections together, it is, I think, reasonably clear that sec. 306 was not intended to affect any railway but those named in it and their branches.

The amendments which from time to time have been made to sec. 173 do not help the appellant. That section deals with matters as to which the Parliament of Canada has legislative authority, whether or not the intersecting railway has come under its exclusive jurisdiction by being declared to be a work for the general advantage of Canada—the right of the Parliament of Canada to regulate the manner in which railways under its jurisdiction may be crossed by railways over which Parliament has not acquired legislative authority being undoubted.

The addition made to the Act of 51 Vict. by sec. 1 of 63 & 64 Vict. ch. 23, is the only amendment which at all suggests that Parliament intended by sec. 306 to bring within it all railways which cross any of the railways named in the section.

By sec. 1 the following section was added: “6A. Street railways and tramways, while hereby expressly declared to be subject to such of the provisions of this Act as are referred to in section 4, shall not by reason only of the fact of crossing or connecting with one or other of the lines of railway mentioned in section 306 be taken or considered to be works for the general advantage of Canada, nor to be subject to any other of the provisions of this Act.

“(2) The said section 6A shall also apply to all electric railways (as distinguished from electric street railways) passing through or over the Queen Victoria Niagara Falls Park, or through or over the property of the Province of Ontario lying upon or along the Niagara River and known as the Chain Reserve.”

For the better understanding of the section it may be well to refer to secs. 3 and 4 of ch. 29 of 51 Vict. They are as follows:—

“3. This Act, subject to any express provisions of the special Act, and to the exception hereinafter mentioned, applies to all persons, companies and railways within the legislative authority of the Parliament of Canada, except Government railways.

“4. In addition, all the provisions of this Act relating to any subject or matter within the legislative authority of the Parliament of Canada, and for greater certainty but not so as to restrict the generality of the foregoing terms, all provisions relating to railway crossings and junctions, offences and penalties and statistics apply to all persons, companies and railways whether otherwise within the legislative authority of Parliament or not.”

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It will be observed that the added section, 6A, does not add anything to sec. 306, and may well be taken to have been intended to make it clear that sec. 306 did not apply to street railways and tramways and the electric railways mentioned in sub-sec. 2 of sec. 6A; but, however that may be, I do not think that if, according to its true conception, sec. 306 does not apply to any railway except those named in the section and their branches, sec. 6A can be treated as extending the operation of sec. 306 to railways that are not branches of the railways mentioned in it.

It is somewhat significant that the Dominion Government, though notified of the questions to be raised upon this appeal and entitled to be heard upon it, has not chosen to be represented. The fair inference from this is, I think, that it does not desire to contest the position taken by the provincial authorities that the appellant's railway is not subject to the exclusive legislative authority of the Parliament of Canada, and there is no good reason for forcing upon Parliament an authority which it appears that the Government of Canada has no wish to possess, unless by law that authority has been clearly vested in it.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

Nov. 11.

CUT-RATE PLATE GLASS CO. v. SOLODINSKI.

*Mechanics' Liens—Claim against Purchaser of Land as "Owner"—Absence of Privity—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140 secs. 2 (c), 6, 8—Remedy against Mortgagee—Sale of Mortgages—Mortgagee as Owner—Increase in Selling Value of Land—Evidence—Priority.*

The lien given by sec. 6 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, attaches to the estate or interest of the owner, as "owner" is defined by sec. 2 (c); and in this case it was held, that the defendant B., the purchaser from the defendant S. of land upon which S. was erecting houses, was not personally liable as "owner" for work done and materials supplied by a company, the claimant of a lien, in and for the building of the houses—some of the work having been done and some of the materials supplied after B. took possession, but the company having had no communication, direct or indirect, with him in regard to work or material; what the company did was not done at B.'s request, express or implied, nor upon his credit, nor on his behalf, nor with his privity or consent, nor for his direct benefit.

*Orr v. Robertson* (1915), 34 O.L.R. 147, distinguished.

Held, also, that the defendant H., the mortgagee, did not, in the circumstances of the case, come within the definition of owner; and, there being no evidence

that the selling value of the land incumbered by her mortgages was increased by the work and materials of the aforesaid company, its lien did not attach under sec. 8 of the Act, upon such increased value, in priority to her interest.

*Held*, also, that, in any case, the Act did not authorise a direction that the mortgages should be sold for the purpose of realising the company's lien.

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APPEALS from the judgment of R. S. Neville, K.C., Official Referee, in proceedings under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

The Referee dismissed the claim of the T. Eaton Company Limited to a lien for \$422 and interest as against the defendant Blanchard. The Referee, however, adjudged that the T. Eaton Company Limited was entitled to a lien on the interest of the defendant Margaret I. Hyslop under certain mortgages upon the land, subject to a first charge in her favour for \$11,275.10—the amount advanced by her prior to the registration of the T. Eaton Company's lien.

The T. Eaton Company Limited appealed against the part of the judgment dismissing its claim against Blanchard; and the defendant Hyslop appealed against the part of the judgment declaring the T. Eaton Company entitled to a lien upon her interest in the land, and directing a sale of her securities.

October 7. The appeals were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

G. W. Mason, for the T. Eaton Company Limited, appellant, argued that under sec. 6 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, a lien attached to the estate or interest of the "owner," as defined by sec. 2, and that Blanchard came within the meaning of that term. In support of his contention he cited *Orr v. Robertson* (1915), 34 O.L.R. 147, and *Reggin v. Manes* (1892), 22 O.R. 443.

W. H. Ford, for the respondent Blanchard, said that Blanchard was a *bonâ fide* purchaser for value without notice. Blanchard had not ordered the T. Eaton Company to do any of the work, nor had the work been done at his request, express or implied, or upon his credit, or with his privity or consent: *Slattery v. Lillis* (1905), 10 O.L.R. 697; *Blight v. Ray* (1893), 23 O.R. 415; *Graham v. Williams* (1884-5), 8 O.R. 478, 9 O.R. 458. The case of *Orr v. Robertson* did not apply, because there a request had been implied upon the part of the person found liable. Blanchard did not come within the definition of "owner" in sec. 2 of the Act.



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*E. G. Long*, for Margaret I. Hyslop, mortgagee, appellant, contended that, as the claim of lien against the interest of the purchaser of the equity of redemption had been dismissed, no lien could attach against any other interest, *e. g.*, a mortgagee's interest, in the lands. The mortgagee was not an owner as defined by the Act, nor was there any evidence that the selling value of the land had been increased by the work or materials of the T. Eaton Company, as required by sec. 8, sub-sec. 3, of the Act. There was no power under the Act to enforce a lien against the mortgagee by a sale of her mortgage.

*Mason*, in answer and in reply.

November 11. The judgment of the Court was delivered by LATCHFORD, J.:—In proceedings under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, R. S. Neville, K.C., Official Referee at Toronto, dismissed with costs the action of the T. Eaton Company Limited for \$422 and interest as against the defendant Walter F. Blanchard. He, however, adjudged that the company was entitled to a lien on the interest of Mrs. Margaret I. Hyslop, under certain mortgages upon the land, subject to a first charge in her favour for \$11,275.10—the amount advanced by her prior to the registration of the company's lien. He directed that the mortgages be sold and the proceeds applied, first, in satisfaction of her claim under the mortgages, and, secondly, in or towards the payment of the company's lien.

The company appeals against the judgment dismissing its claim against Blanchard, and Mrs. Hyslop appeals against the order declaring the company entitled to a lien upon her interest in the land and directing a sale of her securities.

On the 14th March, 1914, Blanchard agreed in writing to purchase from the defendant Solodinski certain lots on High Park avenue, Toronto, upon which Solodinski was erecting three houses. The lots were to be taken subject to certain mortgages, then charged thereon, amounting in all to \$17,000. Possession was to be given on the 1st May, by which date the houses were to be completely finished. A conveyance of the lands is in evidence, dated the 17th March, 1914. The date of delivery is not established, but it must have been subsequent to the 21st April, when the affidavit of execution was made. The conveyance was registered on the 27th April.

There is some conflict as to the date when Blanchard took possession; Solodinski says at the beginning, and Blanchard about the end, of May. The exact date is not material. Very little remained to be done to the houses after May-day, but that little Solodinski did, either personally or through contractors like the T. Eaton Company. It appears that, while the company completed its contract with Solodinski about the 13th June, some little additional work is sworn to have been done on the 6th and 7th July. On the 4th or 5th August, the final adjustments were made between the vendor and the purchaser—the vendor making a statutory declaration, which he knew to be false, to the effect that he had paid for all labour and material. On the 6th August, the T. Eaton Company registered its claim for lien.

Between the time he assumed possession and the beginning of August, Blanchard, who resided near Newmarket, visited the houses once or twice a week. The keys were in the hands of persons whom he employed to decorate the interiors. The T. Eaton Company had no communication, direct or indirect, with him in regard to work or materials. What the company did was not done at Blanchard's request, express or implied, nor upon his credit, nor on his behalf, nor with his privity or consent, nor for his direct benefit.

After the 7th July, he complained to the company that the work which he learned the company had done was not well done, and an inspector was sent out, who disclaimed responsibility on the part of the company for the unsatisfactory conditions, and the company did nothing further.

The lien given by sec. 6 of the Act attaches to the estate or interest of the owner, as "owner" is defined by sec. 2, sub-sec. (c), and Blanchard does not fall within that definition.

In *Orr v. Robertson*, 34 O.L.R. 147, relied on by the appellant, the facts were quite different. There the work was held to have been done in furtherance of a request implied from the fact that Tyrrell had made it a term of a contract that a building acceptable to him should be erected, and then had signed the plan forming part of the contract and taken out the building permit. He had thus constituted himself an owner within the meaning given to that term by the statute.

I think the appeal of the T. Eaton Company fails and should be dismissed with costs.

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Mrs. Hyslop's appeal against the judgment so far as it directs a sale of her mortgages, must be allowed—the statute gives no such remedy.

The mortgagee does not, in the circumstances of the case, fall within the definition of "owner," nor is there any finding or evidence that the selling value of the land incumbered by the mortgages to Mrs. Hyslop was increased by the work or materials of the T. Eaton Company—a prerequisite to the attachment of a lien under sec. 8\* upon such increased value, in priority to the interest of a mortgagee.

I think that Mrs. Hyslop's appeal on this ground also should be allowed, with costs to be paid by the T. Eaton Company.

\*The following are the provisions of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, referred to in the judgment:—

2. (c). "Owner" shall extend to any person, body corporate or politic . . . having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and (i) upon whose credit or (ii) on whose behalf or (iii) with whose privity and consent or (iv) for whose direct benefit work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

6. Unless he signs an express agreement to the contrary, and in that case subject to the provisions of section 4, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting . . . of any . . . building . . . for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the . . . building . . . and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner.

8.—(1) The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6. . . .

(3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien shall attach upon such increased value in priority to the mortgage or other charge.

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Nov. 15.

*Water—Floatable Stream—Improvements Made by Crown Timber Licensees—Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 3—Lawful Detention of Water—Rights of Persons Floating Logs on Lower Part of Stream—Claim for Damages for Deprivation of Water—"Freshet."*

The defendants, who had acquired timber rights from the Crown by the purchase of limits in an unsurveyed territory owned by the Crown, in which were found the western sources of the Thessalon river, a floatable stream, began operations in 1913, and constructed a series of dams upon that river—essential for taking away the timber. The plaintiffs had no particular status on the river, but during the season of 1914 were driving logs down it from a tributary of the river which joined it below the confluence of its two branches, and about 15 miles below the defendants' operations on the western branch of the river. The plaintiffs complained that the defendants had deprived them of water sufficient for the purpose of floating their logs in the river:—

*Held*, that as to the floatation of logs in the river, the plaintiffs and defendants had equal rights under the Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 3.

Origin and history of the legislation, and consideration of the meaning of the word "freshet."

*Caldwell v. McLaren* (1884), 9 App. Cas. 392, 406, referred to.

But as to the user of the water above where the defendants had made improvements, they had preferential rights as statutory licensees. The statutory license, implemented by the erection of works, gave them, by necessary implication, superior rights in regard to the use and control of these improvements, as between them and the plaintiffs operating below. There had been no diversion or diminution of the water, no interference with the natural, ordinary flow of the stream; and the rightful retention of the water by the defendants could not be turned into an illegal detention from the plaintiffs.

APPEAL by the defendants from the report of a Local Judge, to whom the action was referred for trial, and who found in favour of the plaintiffs upon their claim to recover from the defendants damages for wrongfully depriving the plaintiffs of water sufficient to float their logs down the Thessalon river; and motion by the defendants for judgment on their counterclaim.

November 1 and 2. The appeal and motion were heard by BOYD, C., in the Weekly Court at Toronto.

George H. Watson, K.C., and T. E. Williams, K.C., for the defendants.

T. P. Galt, K.C., and U. McFadden, for the plaintiffs.

November 15. BOYD, C.:—The right to float timber down streams is part of the early legislation of Canada; and after the Privy Council in *Caldwell v. McLaren* (1884), 9 App. Cas. 392,

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406, declared that such a right was given free of charge as to improvements made upon such streams to render them floatable, there was further legislation pertinent to this case. An Act was passed, 47 Vict. ch. 17 (1884), for "protecting the Public interest in Rivers, Streams and Creeks," with important recitals, of which these may be selected: "Whereas licenses have for many years been granted . . . to cut timber on lands belonging to the Crown through or along which such rivers and streams run. . . . And whereas the said transactions have taken place on the faith that the licensees . . . had, and should continue to have, the right of floating saw-logs and other timber . . . down the streams on which their limits or lands are situate. And whereas . . . the licensees . . . have in many cases expended large sums of money on the lands so granted and placed under license." Then it was, among other things, enacted that, in case it may be necessary to remove any obstruction from the water-course or to construct any apron, dam, slide, gate-lock, boom or other work therein or thereon, necessary to facilitate the floating and transmitting saw-logs, timber, etc., down the stream, it shall be, and is declared to be, lawful to remove the obstruction and to construct the said works of improvement. The Act further went on to provide means whereby toll would be exacted from persons using such improvements, to be paid to the persons who had constructed and maintained them.

That was the state of the law under which both parties were conducting operations in the spring of 1914, and these provisions are now to be found in the Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 3.

The plaintiffs have no particular status on the Thessalon river, but during the season in question were driving logs down the river from Wood's creek, a tributary of the Thessalon river, joining that stream below the confluence of its two branches, and about 15 miles south of the defendants' operations on the western branch of the river. The defendants had acquired timber rights from the Government by the purchase of berth No. 195 on the north shore of Lake Huron, in the district of Algoma, an unsurveyed and primitive territory, in which are the western sources of the Thessalon.

The defendants began operations, for the first time after acquiring the limit, in 1913, and proceeded to construct a series of

dams, of which three were storage dams, and seven or eight others used for flooding purposes in getting the logs over rocks, rapids, and shallows, and other impediments. These improvements were essential for taking away the timber, and there is no complaint and no reason to suspect that they were not properly placed and properly used in order to facilitate the transport of the logs to and down the river—that is, so far as the defendants are concerned. The plaintiffs *do* plead that the dams were illegally used to obstruct the water, but otherwise it is to be taken that they were well and skilfully placed so as best to enable the defendants to utilise their timber limits. One other general observation is, that the whole region on and along the Thessalon is owned by the Crown, and that the rights of both parties are to be measured by the statute law and common law, if that be required.

The more important of the dams in connection with this controversy are the main storage dam at Stone Lake, having capacity to hold 9 feet of water and being the largest reservoir, and the most southerly dam at Carpenter Lake, of 3 or 4 feet holding capacity, and used as needed either as a storage dam or a flooding dam.

The plaintiffs relied on the spring freshets to get the logs down from Wood's creek. Work was begun in breaking the dumps and clearing the way to water the logs on the 20th April. There was a notable rain-storm for two nights and a day continuously on the 27th and 28th April; and, apart from this, very little rain the whole season. The plaintiffs' logs were through the creek and at the river on the 6th May; they drove on the river for two or three days till the night of Saturday the 9th May. No work on Sunday, and on Monday morning the logs were high and dry on sand-bars two or three miles from the river, which had scarcely any water in it. The water is said to have dropped 6 or 8 inches on the 9th; but on the 11th it had dropped about 2 feet. The plaintiffs attribute this loss of water to the closing of Carpenter creek dam by the defendants. There is a conflict of testimony as to the date on which this was done. The Judge has found that it was closed on the 9th May (as the plaintiffs' witnesses say), and not on the 11th May, Monday (as the others say). In my view of the case, it is not important on which day it was closed.

There was also much conflicting evidence as to the duration

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of the spring freshets. But in truth one of the witnesses for the plaintiffs came nearest to the fact when he said: "You can't tell the length of a freshet within a week or a month; it depends on rain and temperature." The dictionary meaning of the word "freshet" is the same as the statutory and popular meaning, and that is, a flood or inundation by means of rains or [and] melted snow. Much of the evidence as to other freshets and the driving in other places was of small import. Each year and each season is different as to freshets, depending on climatic conditions—the amount of snow, the amount of rain, and the state of the thermometer. And as to drives, the time consumed depends on the character of the logs, the state of the water, the number of hands at work, and the handling of the descending timber. Generally, on the evidence, I should consider that the season of 1914 was exceptionally dry after the great rain of April, and that the water was lower than usual, and that the freshet for that season at its height by reason of the April rain was about spent before the 10th May. The plaintiffs' witness Dunbar says (p. 143) that the freshets that year in that place, Wood's creek, were over about the 9th May; and (p. 144) he does not think that the water continued to rise till the 6th May.

Amid much nebulous and speculative evidence, mixed with the observation of the actual localities spoken of by those who had been over the ground, it seems tolerably clear that of the whole watershed area drained by the Thessalon and its tributaries above Wood's creek, less than one-half would be attributable to the west branch of the river, which drains berth 195. That is, if one takes the water from Wood's creek into account, which is twice as large as Carpenter's creek, there would be at least more than one-third of the water in the natural flow of the river as a whole at the entrance of Wood's creek, coming from sources other than down through the defendants' works and dams. Hence if it be that there was a fall of two feet in the river where the plaintiffs were on the 11th May, and this was from the freshet then continuing, why when it was stopped was there no evidence of any flow of the freshet from the west branch and from Wood's creek? The volume of the freshet from these two currents would have been greater than from the other branch of the river coming from berth 195. But, on the plaintiffs' proof, the stoppage of the water at Carpenter Lake dam stopped all attempts at floating

the logs. This state of affairs is consistent with only one conclusion, viz., that the freshet had spent its force and that the run of all the waters of the river was being reduced to the ordinary, natural flow, never sufficient for timber operations.

But, assuming that two feet of water were cut off by the defendants' action in closing the dam (and this does not rest upon proof, but upon inference only), what was that water? In my opinion, it was neither current freshet water nor the ordinary natural flow of the stream, but water stored for the defendants' own operations, which, if not so impounded, would have passed off down the river before the plaintiffs' men were at the mouth of Wood's creek.

The defendants' *modus operandi* is to be considered. In the fall and winter of 1913 and early spring of 1914, the three storage dams at Stone Lake and Lake Camp 1 and Lake Camp 2 were closed and had accumulations of water in before the great rain came on. That filled to overflowing the two smaller dams, but in the big controlling dam, Stone Lake, it was filled only to less than 8 feet, about 7½ feet. Carpenter Lake dam was left open all the time till stop-logs were put in early in May. After the heavy rain, Lake Camp 1 was opened and the water went down to 4 inches. Lake Camp 2 dam had 2 or 3 stop-logs taken off to ease the pressure during the rain, and remained with about 4 feet of water stored. In Stone Lake dam, next day after the rain, it sprang a leak, and, though partly repaired, it continued to leak till after the 15th May. Through the leak there was a discharge of 4 feet of water, which about equalised any inflow, so that it did not "raise" perceptibly after that. From this big leak and from crevices in the other dams came the water that went down the river in the early part of May. There was some addition also of water let down on the 3rd and 5th May from Stone Lake dam for the purpose of working logs into shape so as to be ready to go down with the drive anticipated. It seems reasonably clear that but for the storage of the earlier water there would have been no supply of surplus water going to the plaintiffs at all after they reached the river.

The stop-logs were put in Carpenter Lake dam because there was more water needed at that point to get some of the defendants' logs into better position. It is not without pertinence that, while

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the plaintiffs failed to make the mouth of the river, the defendants were equally unfortunate in not getting their logs out into floatable water. The supply stored was insufficient for the defendants' wants, and both are in like bad case from the shortage of the water that season.

It may be that, owing to the changed condition of the river in recent years, its broadening and shortening, lumbermen below will find it necessary to erect dams in Wood's creek or above the river near there with a double view of getting over the difficult rapids in Wood's creek, which delayed the plaintiffs for too many days, and also to capture the surplus water which comes during the operations in the upper river when water let down by the defendants for emergencies in the day-time passes off during the night opposite and below Wood's creek, and so is lost. I suspect that, considering the difficulties of the situation and the season, there was an insufficient gang of men handling the plaintiffs' drive. But this is by the way.

Next, what is the legal position of the parties? As to the floatation of logs in Thessalon river, each had equal rights under the statute; but as to the user of the water above where the defendants had made improvements, they had preferential rights. They were the first and the only occupants of these head waters of the Thessalon river, and as to their various works to facilitate the driving of logs to the market they were statutory licensees. The statutory license, implemented by the erection of works, did by necessary implication give them superior rights in regard to the use and control of these improvements, as between them and the plaintiffs operating on the river at Wood's creek. As a matter of natural justice, the timber licensee who had the right to further his operations by the construction of dams, etc., had also the right to put them to the most beneficial and profitable use for his own undertaking primarily, and was not called on, to his own prejudice, to make his reserves of water subservient to the needs of a lower operator. If any detriment arises from the proper and reasonable use of the dams to facilitate the transmission of the defendants' logs (and nothing to the contrary of this is proved), then the plaintiffs have to submit to the disadvantage as a necessary consequence of their position. This water so stored was essential to the defendants' use; were they to suffer by its release that the plaintiffs might benefit thereby? Briefly, there has been

no diversion or diminution of the water, no interference with the natural, ordinary flow of the stream; and the rightful retention of the water by the defendants cannot be turned into an illegal detention from the plaintiffs.

After carefully reading and considering the voluminous evidence, I am compelled to the conclusion that in all aspects of the case, whether of fact or of law, the plaintiffs have not established a claim for damages. The judgment given in the primary court is to be reversed, and the action stands dismissed with costs.

The amount agreed upon as to the defendants' counterclaim should be paid by the plaintiffs—but without costs.

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## [APPELLATE DIVISION.]

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Nov. 16.

RE HANNAH AND CAMPBELLFORD LAKE ONTARIO AND WESTERN  
R.W. Co.

*Railway—Expropriation of Land—Dominion Railway Act—Award—Compensation—Method of Estimating—Value of Land Remaining after Expropriation—Offer to Reconvey Part Taken—Increase in Commercial Value—Potentialities and Contingencies.*

In ascertaining the compensation to be made by a railway company in respect of land taken for the railway, under the Dominion Railway Act, R.S.C. 1906, ch. 37, the proper method is to ascertain the value of the whole parcel of which part has been taken and the value of the remaining portion after the taking and deduct one from the other—the difference is the compensation to be allowed.

*James v. Ontario and Quebec R.W. Co.* (1886-8), 12 O.R. 624, 15 A.R. 1, followed.

In estimating the value of land, it is the pecuniary or commercial value that must be considered; in determining that value all potentialities and contingencies must be taken into account; and that applies to the determination of the value after as well as before the expropriation.

*Re Macpherson and City of Toronto* (1895), 26 O.R. 558, 565, and *In re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, 6 Can. Ry. Cas. 395, approved and applied.

In estimating the value of the land left after the taking, the fact that if a reconveyance by the railway company of the property taken were accepted by the owner the land would be increased in value, must be taken into account.

APPEAL by the railway company from an award of three arbitrators upon an arbitration under the Dominion Railway Act.

The company took and paid for land of Robert Hannah upon which to build their railway. They also took from him land for a gravel-pit; after taking away a quantity of gravel, they found it was not suitable, and offered and continued to offer a

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reconveyance of the land thus taken; but Hannah refused and continued to refuse to accept it.

On an arbitration as to the damages to be awarded for severance, etc., the arbitrators found \$10,500—not taking into consideration the offer to reconvey.

The majority of the arbitrators stated that, in arriving at the sum to be allowed to Hannah for compensation, they endeavoured to ascertain the difference in value to the claimant between the farm as it existed as one body of land before the taking of part and the farm as it was left after such taking and after work done upon it by the company.

November 1. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

*W. N. Tilley*, K.C., and *J. D. Spence*, for the appellant company, argued that, if adequate compensation were given for gravel taken, the company might abandon, even if possession had been taken under a Court order. On the question of abandonment, the following cases, which appeared to be against the appellant company, were distinguishable upon the facts: *Canadian Pacific R.W. Co. v. Little Seminary of Ste. Thérèse* (1889), 16 S.C.R. 606; *Re Haskill and Grand Trunk R.W. Co.* (1904), 7 O.L.R. 429. Where the arbitration has not been effective, the Court must decide: *Atlantic and North-West R.W. Co. v. Wood*, [1895] A.C. 257; *Cameron v. Cuddy*, [1914] A.C. 651, at p. 656. On the question of valuation, see *Irwin v. Campbell* (1915), 51 S.C.R. 358.

*M. K. Cowan*, K.C., and *J. E. Madden*, for the claimant, respondent, referred to the evidence on the question of the damage done to the land. They relied on *Canadian Pacific R.W. Co. v. Little Seminary of Ste. Thérèse*, 16 S.C.R. at pp. 613–617, especially at p. 614: “Abandonment of the notice for lands, or notice of intention to take lands, must take place while the notice is still a notice and before the intention has been executed by taking the lands.”

*Tilley*, in reply, referred to the evidence.

November 16. RIDDELL, J.:—The Campbellford Lake Ontario and Western Railway ran through the land of Robert Hannah, in the township of Camden—the company took certain land for their right of way, which they have paid for. They also took

certain land for a gravel-pit, and, after taking considerable gravel away, found that it was not suitable, and they offered and continue to offer a reconveyance of the land thus expropriated—Hannah refuses to accept it, and tells us, by his counsel, that he does not want the land at all.

On an arbitration as to the damages to be awarded for severance, etc., the arbitrators found \$10,500, adding in the award the following:—

“In fixing the above amount, we are of the opinion that, in ascertaining the compensation and damages with reference to the time of taking possession as aforesaid, it would not be proper nor would we be at liberty to take into consideration the deed of reconveyance of the land expropriated, tendered by the said railway company to the claimant on the 18th day of May, 1915, and declined by the claimant, and we have therefore not done so.”

The railway company appealed to this Court; we thought that it would be well to have the reasons for the decision of the arbitrators, and called for them. The majority of the arbitrators have furnished the following as their reasons: “Having been asked for our reasons for awarding the claimant herein the sum of \$10,500, we would state that, in arriving at the sum to be allowed the claimant Robert Hannah for compensation, we endeavoured to ascertain the difference in value of the farm to the claimant, between the farm as it existed as one continuous tract used and farmed as one body of land by him before the expropriation of the part taken by the railway, and the farm as it was left after such expropriation and the work done on it by the railway, and in arriving at this difference in value we gave such weight as we thought just to the evidence of the several witnesses produced before us by both parties, and twice visited and inspected the premises, and decided that, in our judgment, based on such evidence and inspections, the sum of \$10,500 was the fair and just allowance to make for such difference or depreciation in value to the claimant.”

The third arbitrator does not dissent from this method. Very considerable evidence was given of the amount by which the damages would be diminished—or the present value of the farm would be increased—by the addition thereto of the land expropriated but now useless to the railway company, the least sum being \$750.

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That the conduct of the owner is against the public welfare requires no argument; he desires to be paid money that land be idle rather than increase the value of his own land. But his legal rights are all we can consider here. That the general principle followed by the arbitrators is sound there can be no doubt. In ascertaining the compensation for land taken, it is clear that the proper principle is to ascertain the value of the whole land before the taking and the value of the remaining portion after the taking and deduct one from the other—the difference being the compensation to be allowed: *James v. Ontario and Quebec R.W. Co.* (1886-8), 12 O.R. 624, 15 A.R. 1.

In estimating the value of land, it is not the sentimental value but the pecuniary or commercial value that must be considered—and in determining this, of course, all potentialities must be considered and contingencies taken into account: *Re Macpherson and City of Toronto* (1895), 26 O.R. 558, 565; *In re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, 6 Can. Ry. Cas. 395; and there can be no possible reason why this should not be done when estimating the value after as well as before expropriation.

If we were considering the value of land before expropriation and found that it could be made more valuable by a trifling expenditure or none—or say by accepting a deed of adjoining property—that circumstance would be taken into account—must be taken into account—in arriving at the market, pecuniary or commercial value; accordingly, in estimating the value of what was left, the fact that by simply accepting a deed of the property the land would be increased in value must be taken into account.

In neither case before or after taking is the fact (if it be a fact) that the owner does not want and cannot be compelled to take a deed of adjoining land of any consequence—it is not what he wants to do but what is the value of the property as it stands.

We do not decide that the railway company have the right to compel the owner to accept a deed and take back the property—the effect of the readiness of the railway company to reconvey is in the present judgment considered only on the point of the value of the property being thereby increased commercially.

In much the same way, while the owner could not be compelled to till his land in a particular way, etc., the fact that the

land could, by being tilled in a particular way, etc., be made much more valuable, is an element which should be considered in estimating the value of the land.

I think that it is clear from the evidence that by accepting a deed the land remaining to the owner would be worth \$750 (at least) more than it otherwise would be—this element has been disregarded (I think wrongly) by the arbitrators, and the award should be diminished by \$750—the railway company to tender the deed again to the owner.

Success being divided, there should be no costs of this appeal.

FALCONBRIDGE, C.J.K.B., concurred.

LATCHFORD and KELLY, JJ., agreed in the result.

*Appeal allowed in part; no costs.*

[APPELLATE DIVISION.]

BELL V. TOWN OF BURLINGTON.

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Nov. 17.

*Assessment and Taxes—Annexation of Part of Township to Village—Orders of Ontario Railway and Municipal Board—Erection of Village, including Annexed Territory, into Town—Assessment of Lands in Annexed Territory—Assessment not Applicable to Current Year—Injunction against Collection of Taxes—Taxation without Representation—Validity.*

To entitle a municipality to demand taxes, a legal and proper assessment must (speaking generally) be made out.

*Held*, in this case, reversing, upon one branch of the case, the judgment of Boyd, C., 34 O.L.R. 410, that there was no legal assessment of the plaintiff's land—the only assessment made being such as could not be made use of until the following year—and the defendants should be restrained from collecting the taxes alleged to be payable.

In other respects the judgment of the Chancellor was affirmed.

*Per* RIDDELL, J.:—The statute does not make the liability to pay taxes depend on the capacity to vote. It may be that taxation without representation is unconstitutional; but that means only that it is opposed to the principles, more or less vaguely and generally stated, upon which the people should be governed; to say that something is unconstitutional does not indicate anything as to its legality.

APPEAL by the plaintiff from the judgment of BOYD, C., 34 O.L.R. 410.

November 3. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. Laidlaw, K.C., for the appellant. Section 17 of the Municipal Act, R.S.O. 1914, ch. 192, does not apply; the order of the

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Board did not begin to operate till the 1st January, 1915, and the Municipal Act terminates the municipal year on the 31st December. The land in question in this case was not represented in the town council, and you cannot have taxation without representation; see sec. 32 of ch. 192 in this connection. Sections 63 and 64 relate to nomination meetings, and sec. 93 refers to voters' lists, and is made to cover this particular case. By sec. 39, sub-sec. 2, the taxes in dispute belong to the Corporation of the Township of Nelson. On the question of there being no legal right in the town to assess, see *Arthur Roman Catholic Separate School Trustees v. Township of Arthur* (1891), 21 O.R. 60, at p. 70 *et seq.*; Farwell on Powers, pp. 343, 344.

*W. Morison*, for the defendants, the respondents, argued, upon the facts and the evidence, that the trial judgment should be upheld. On the question of assessment, he referred to the Assessment Act, R.S.O. 1914, ch. 195, sec. 56.

*Laidlaw*, in reply.

November 17. RIDDELL, J.:—An appeal from the judgment of the Chancellor (1915), 34 O.L.R. 410. The important facts are stated in the report just cited; one or two statements, the accuracy of which is denied, are of no consequence in the view I take of the matter.

I do not think it necessary to discuss the validity of the order of the Ontario Railway and Municipal Board of the 10th June, 1914—I see, however, no reason to disagree with the view of the learned Chancellor, simply adding a reference to *Re Simpson and Village of Caledonia* (1912), 20 O.W.R. 874, 3 O.W.N. 503. But it is wholly immaterial whether this order is or is not valid—the important order is that of the 9th December, 1914. That affects to create a town with a territory “including the territory annexed thereto by the Board on the 10th June, 1914.” This is descriptive of the territory, and not of the legal effect of the order; and the invalidity in law of the order could have no effect on the description—the Board believed that their order of the 10th June would effect at some future time the annexation of certain property described therein, and the language employed in the December order referred to that topographically, not legally. I have, therefore, no doubt that this order is valid under the Municipal Act, R.S.O. 1914, ch. 192, sec. 20 (1), (2)—the latter sub-section

enabling the Board to add the annexed territory. If there were any doubt, it would perhaps be removed by sec. 20 (7), but there is none.

But a much more formidable obstacle in the way of the defendants remains to be considered.

Taxes are not payable by any moral law or rule of the common law—they are in our system a pure creature of the statute; and, before they can be required of any one, some legal and statutory obligation must be made out. Use of streets, advantage of light, etc., etc., are all of no avail—the visiting motorist may have more advantage of these than some inhabitant of the town. It is quite clear that to entitle a municipality to demand taxes a legal and proper assessment must (speaking generally) be made out—no authority can be necessary for this proposition, and I cite only one: *Re Clark and Township of Howard* (1885), 9 O.R. 576.

Here there was no legal assessment at all of this land—the only assessment made being such as could be made use of for the following year only: the Assessment Act, R.S.O. 1914, ch. 195, sec. 56 (1)—sec. 56 (2) cannot be made to apply, as there had been a final revision of the roll; the roll itself shews this plainly.

It is said that it was impossible to make a legal assessment of this land, and probably that is so, but this fact does not entitle the defendants to demand taxes on a wholly illegal assessment. (Section 54 has no reference to the present case.)

I do not think that the defendants can be permitted to exact these taxes.

The statement of claim asks that it be declared that the land in question is not within the limits of the town of Burlington, and not liable to be assessed; also that the orders of the Board should be declared invalid—in this the plaintiff fails.

He should succeed in obtaining an injunction to restrain the defendants from collecting the taxes now alleged to be payable. Success being divided, there should be no costs of action or appeal, and the appeal should be allowed to the extent indicated.

I do not think that any effect can be given to the argument that the plaintiff and those in like case have no representatives on the council, that they had no opportunity to vote for councillors, and that taxation without representation is unconstitutional.

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That this maxim is profoundly true may certainly be admitted—but we must carefully distinguish the meaning of the word “unconstitutional” in British and in American usage. In our usage, that is unconstitutional which is opposed to the principles, more or less vaguely and generally stated, upon which we think the people should be governed; in the American sense, it is that which transgresses the written document called the “Constitution.” With us, anything unconstitutional is wrong, though it may be legal; with them, it is illegal, though it may be right. Accordingly, to say that a measure is unconstitutional does not with us indicate anything as to its legality.

It must be remembered, too, that thousands may be made to pay taxes who cannot vote for councillors—the infant, the married woman (whether this be on the principle that if she has a good husband she should not require a vote, and if she has a bad one she has trouble enough—or upon whatever principle or want of principle). The statute does not make the liability to pay taxes depend on the capacity to vote, and we cannot legislate.

It may be worth while for the defendants to apply to the Legislature to correct the statute by supplying the *casus omissus*—the Legislature has, of course, the power to pass any legislation validating past acts or providing remedies for past errors.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

LATCHFORD, J.:—Of the many questions raised in this appeal, the only one with which, in my opinion, it is necessary to deal, is, that there could not be a valid levy by the defendants of the taxes of 1915, because there was no valid assessment.

Unless there was an assessment according to the power conferred upon the municipality by the Legislature, the plaintiff is not in law liable for the taxes levied upon his property. Whether a proper assessment could or could not have been made in 1914—as to which I express no opinion—the act of the Commissioner appointed by the by-law of the 22nd March, 1915, in making the assessment, and the confirmation in June, 1915, by by-law, of that assessment, are both without warrant by any statutory enactment to which counsel for the defendants has referred, or which a careful search has revealed.

On this point the plaintiff is, I think, entitled to succeed. He

should pay the same taxes as his fellow-townsmen, and the Legislature might well in such a case enable the defendants to compel payment.

As the plaintiff fails on all other grounds, there should, I think, be no costs of action or appeal.

KELLY, J.:—I agree in the result arrived at by my brother Riddell. To impose a tax legally, there must be first a valid assessment. The Assessment Act indicates the means by which such assessment must be made; and, as a taxing Act must be construed strictly (*Cox v. Rabbits* (1878), 3 App. Cas. 473), failure, such as is found in the present case, to observe the imperative requirements of the Act, is fatal. By no construction which can be put upon the procedure on which the defendants rely as imposing on the plaintiff's property the tax now objected to, can it be said that the imperative requirements of the Act have been complied with.

It does not affect the legal aspect of the matter that the plaintiff and his property now in question participate in the advantages for which his neighbours pay, and towards which he is unwilling to contribute.

*Appeal allowed in part.*

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[MEREDITH, C.J.C.P.]

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## OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

## OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

*Constitutional Law*—5 Geo. V. ch. 45 (O.)—*Roman Catholic Separate Schools—Suspension of Powers of Trustees—Conferring Powers upon Commission—Intra Vires—British North America Act, 1867, sec. 93 (1)—“Right or Privilege with Respect to Denominational Schools”—Legislation Prejudicially Affecting—Appointment of Inspector—Use of French Language in Schools—Separate Schools Act, R.S.O. 1914, ch. 270, secs. 18 (a), 78—“Regulations”—Department of Education Act, R.S.O. 1914, ch. 265.*

The Ontario statute 5 Geo. V. ch. 45, which provides for the suspension of the powers of the Ottawa Roman Catholic Separate School Board, and for conferring such powers upon a Commission, is within the legislative power of the Province.

The statute does not “prejudicially affect any right or privilege with respect to denominational schools” which “Roman Catholics” had, in Upper Canada, at the time of the passing of the British North America Act, 1867 (sec. 93, sub-sec. 1, of that Act).

In actions brought to recover control of the separate schools of Ottawa, of which, under the provisions of 5 Geo. V. ch. 45, the plaintiffs had been deprived, no evidence of any such prejudicial effect was given; and the actions were dismissed.

The restriction upon the power to legislate was not in favour of the plaintiffs, nor of those who elected them, but of the whole class of adherents of the Church of Rome throughout the Province.

The effect of the legislation was not to deprive the ratepayers of their money, but merely to change the trustees; the money must be devoted to the same purposes, whosoever the trustees might be.

The creation of the office of Minister of Education, and the enactment of all the elaborate legislative provisions respecting education, were not for the mere benefit of parent or child; the paramount purpose was to serve the public interests of the Province.

Special separate school provisions were made for one great class of residents in the Province—Roman Catholics—but such separation in no wise affects the public purposes of the schools; the schools are all subject to the control of the provincial educational authorities; and that control extends to inspection and languages (sec. 78 of the Separate Schools Act, R.S.O. 1914, ch. 270, and sec. 18 (a), giving the meaning of “Regulations” and referring for their character to the Department of Education Act, R.S.O. 1914, ch. 265).

The British North America Act, 1867, did not make all the provisions of the Separate Schools Act, in force in 1867, unalterable; the right and privilege which the Separate Schools Act conferred when the Imperial enactment became law, and which the Separate Schools Acts have ever since conferred and still confer, was and is a right to separation—to separate public schools of the like character and maintained in the like manner as the general public schools.

The appointment of an inspector who was not a Roman Catholic, and an overruling of the plaintiffs’ desires as to the language to be used in teaching, were not unlawful.

*Mackell v. Ottawa Separate School Trustees* (1915), 34 O.L.R. 335, followed.

The removal of trustees who failed or refused to perform the duties of their office was not an infringement upon any legal right.

The fact that an appeal against a judgment is contemplated is no excuse for disregarding it, unless its effect is by law suspended during the appeal.

The Legislature of Ontario has power to abolish all public schools, and so to abolish separate schools, for then there would be nothing to be separated from, and so no right or privilege of separation.

THE first action was brought by the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa, and

Charles Leclerc, Albert Bergevin, Francois Xavier Larocque, Calixte Dubé, and Alexandre Grenon, supporters of Roman Catholic Separate Schools for the City of Ottawa, plaintiffs, against the Corporation of the City of Ottawa and the Ottawa Separate School Commission, defendants; the second action was brought by the same plaintiffs against the Quebec Bank and the Ottawa Separate School Commission, defendants.

In the first action, the plaintiffs claimed an injunction restraining the defendant the Corporation of the City of Ottawa, its attorneys, servants, or agents, from parting with, delivering over, transferring, or paying to the defendant the Ottawa Separate School Commission, or to any one else, except the plaintiff Board of Trustees, all those certain sums of money previously or thereafter levied, received, or collected by the said defendant corporation from the supporters of Roman Catholic Separate Schools for the City of Ottawa for the support and maintenance of said schools or for the purposes of the plaintiff Board, or which might be thereafter levied, received, or collected for such purposes for and on behalf of the said Board, and restraining the defendant Commission from demanding or receiving from the said corporation such sums of money or any part thereof so held by the said defendant corporation or which might be thereafter levied, received, or collected by the corporation defendant from the said supporters of Separate Schools for the purposes aforesaid.

In the second action, the plaintiffs claimed an injunction restraining the defendant the Quebec Bank, its attorneys, servants, or agents, from parting with or delivering over to the defendant the Ottawa Separate School Commission, or to any one else whomsoever except the plaintiff Board, all those certain sums of money which on the 23rd July, 1915, were on deposit with the said bank in the name of and for the account of the said Board, or any part thereof, as well as any other sum thereafter deposited with the said bank for or to the credit of the said Board, and restraining the defendant the Ottawa Separate School Commission, its attorneys, servants, or agents, from drawing or receiving such sums so deposited with the said bank or any part thereof.

By an order of the Lieutenant-Governor of Ontario in Council, made on the 20th July, 1915, the defendant Commission was created a body corporate and appointed to control, conduct, and

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manage the Roman Catholic Separate Schools for the City of Ottawa; and on the 23rd July, 1915, the Commission, acting under the order in council, took or attempted to take possession of the properties and assets formerly controlled by the plaintiff Board and to exercise the rights formerly exercised by the Board. The Commission was appointed pursuant to the Ontario Act 5 Geo. V. ch. 45, upon the Board, in the opinion of the Minister of Education, failing to comply with the provisions of that Act.\*

These actions were begun on the 28th July, 1915.

October 30. The actions were tried by MEREDITH, C.J.C.P., without a jury, at Ottawa.

*N. A. Belcourt, K.C., J. A. Ritchie, and E. R. E. Chevrier*, for the plaintiffs.

*W. N. Tilley, K.C.*, for the defendant the Ottawa Separate Schools Commission.

*F. B. Proctor*, for the defendant the Corporation of the City of Ottawa.

*Arthur Ellis*, for the defendant the Quebec Bank.

*McGregor Young, K.C.*, for the Attorney-General for Ontario.

November 18. MEREDITH, C.J.C.P.:—The single question involved in these actions, is: whether the legislation in question, which provides for the suspension of the powers of the Ottawa Roman Catholic School Board, and for conferring such powers

\*The Act 5 Geo. V. ch. 45 was assented to on the 8th April, 1915. It recites that in the action of *Mackell v. Ottawa Separate School Trustees* (1914-15), 32 O.L.R. 245, 34 O.L.R. 335, the Ottawa Separate School Board contended that Regulations 17 of 1912 and 17 of 1913 made by the Minister of Education were *ultra vires*; and that the Board had failed to open the schools under its charge at the time appointed by law, and to provide or pay qualified teachers, etc. By sec. 1 it was declared that, subject to the question of the legislative authority of the Province, the Regulations were duly made and approved and were binding upon the Board. Section 2 declared that it was the duty of the Board to open and conduct the schools according to law, to employ and engage qualified teachers, etc. Section 3: "If, in the opinion of the Minister of Education, the said Board fails to comply with any of the provisions of this Act, he shall have power, with the approval of the Lieutenant-Governor in Council—(a) To appoint a commission . . . ; (b) To vest in and confer upon any commission so appointed, all or any of the powers possessed by the Board under statute or otherwise, including the right to deal with and administer the rights, properties and assets of the Board and all such other powers as he may think proper and expedient to carry out the object and intent of this Act; (c) To suspend or withdraw all or any part of the rights, powers and privileges of the Board, and whenever he may think desirable to restore the whole or any part of the same and to re-vest the same in the Board; (d) To make such use . . . of any legislative grant . . . as the Minister may in writing direct."

upon a commission, is within the legislative power of this Province: and that question has been, in argument, further confined to the single point: whether such legislation "prejudicially affects any right or privilege with respect to denominational schools" which "Roman Catholics" had, in Upper Canada, at the time of the passing of the British North America Act, 1867: see sec. 93, sub-sec. 1, of the Act.

The plaintiffs, the School Board and some separate school supporters, bring these actions to recover control of these separate schools, of Ottawa, of which, under the provisions of the enactment in question (5 Geo. V. ch. 45), the trustees have been deprived; and they base their claims upon the one ground: that that enactment does prejudicially affect the right of the supporters of such schools: but they have given no evidence of any such prejudicial effect: and have successfully opposed the admission of any evidence, on the part of the defendants, in support of their contention that, not only is there no such prejudicial effect, but that the effect is beneficial, and was necessary.

Besides adducing no evidence of any such prejudicial effect, the plaintiffs admitted, for the purposes of these actions, the truth of the statements contained in the preamble to the enactment which they attack; some of which statements are: that the Board had failed to open the schools, under its charge, at the time appointed by law, and had threatened, at different times, to close such schools, and to dismiss the qualified teachers engaged to teach therein.

In these circumstances, the actions fail, at the threshold, for want of evidence of any such prejudice, without which the power of the Legislature to enact such legislation is unrestrained.

But it was urged that the legislation in question deprived Roman Catholic Separate School supporters, of Ottawa, (1) their elective public school franchise; and (2) of their own school moneys; and so must necessarily, and unanswerably, prejudicially affect them.

The fallacies of this contention seem to me to be obvious: the restriction upon the power to legislate is not in favour of these plaintiffs, nor of those who elected them; but is in favour of the whole class, a class which comprises all the adherents of the Church of Rome throughout this Province, of whom those in

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Ottawa, concerned in these actions, form but a very small part: and it may very well be that that which might prejudicially affect the one might not so affect the other; and, in easily imagined circumstances, it even might be for the good of an individual himself, or of a community itself, to be deprived of an elective right—for one instance, if such right were used for illegal and punishable purposes; and the ratepayers have not been deprived of their money, the trustees of it have been changed only: the money must be devoted to the same purposes, whosoever may be the trustees.

So that, in the absence of evidence, of any kind, of prejudicial effect, of the whole class, or even any objection to the legislation in question except by these few plaintiffs out of the hundreds of thousands of persons who comprise that class, the actions, as I have said, fail, and must be dismissed; and the successful parties should have their costs from the unsuccessful.

But the learned and elaborate manner in which these cases were argued calls for more than a mere nonsuit, as it were; and, therefore, I proceed to deal with the matters discussed, more fully.

The position for which the plaintiffs contend is, as it seems to me, the result of a misconception of the purposes, as well as of the effect, of the legislation under which the trustees held office. The creation of the office of Minister of Education, and the enactment of all the elaborate legislative provisions, of this Province, respecting education—covering over 250 pages of its statute-books—were not for the mere benefit of parent or child; the paramount purpose, the dominant intention, was the public interests of the Province, the making of true and efficient subjects of all its children—loyal and efficient subjects and citizens, the best assets of every state.

For such purpose public schools, and compulsory education, are essential; and so public schools were established long ago, and have been, and are, maintained; and compulsory laws are in force.

In consequence of the religious desires, or duties, of some classes of the community, separation in schooling is permitted; and special separate school provisions were made for that great class of residents of the Province, described in the legislation upon the subject as Roman Catholics.

But such separation in no wise affects the public purposes of the schools, or makes the one, any more than the other, the less a public school in the sense and for the purpose I have mentioned.

The trustees of all are, alike, public officers, having the like duties and powers, and subject to the like pains and penalties for misconduct in office, and the schools are all subject to control of provincial educational authorities; and are all alike entitled to share equally in the provincial grants of money made for public school purposes.

This, as it seems to me, would be plain, plain in regard to the two subjects—inspection and languages—which are said to be the bones of contention from which this litigation has sprung, as well as, speaking generally, in all things; plain if there had been no expressed words upon the subject; but there are such words, and were at the time of the passing of the British North America Act, 1867: the words now in force upon the subject, contained in the Separate Schools Act, R.S.O. 1914, ch. 270, sec. 78, are: "The schools with their registers shall be subject to such inspection as may be directed by the Minister of Education and shall be subject also to the Regulations." And the word "Regulations" means (sec. 18 (a)): "regulations made under the Department of Education Act;" the wide character of which is set out in that enactment, R.S.O. 1914, ch. 265; so that that which would have been plain without them is put beyond controversy by these plain words.

If, as it was contended, the right of parent or child should be paramount, why make any laws interfering with the liberty of either to be educated or uneducated as he or she sees fit; and why compel men and women without children to pay equally with those who have, that is, to pay for the education of their neighbours' children? And, if the separate school system were to be anything more than one of the branches of the whole public school system, why should the former be left without any council or general representative body—a vast number of schools without cohesion, head, or representative body?

The public school system of Ontario is not one of separate independent schools in all the school sections of the Province, each one of which may be "a law unto itself" or as lawless as it pleases; but is one comprehensive and symmetrical system em-

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bracing every one, from the Minister of Education to the youngest infant in the kindergarten, whether in the common or the separate school, and all alike are subject to the laws of the Province and all valid regulations made under them.

The narrow view that the Imperial enactment made all the provisions of the Separate Schools Act, in force at the time of the passing of the Imperial Act, unalterable, is without any kind of substantial support, as the great many changes since made, and made apparently without any kind of objection, shew; important changes, turning an Act of 28 sections, covering less than a half dozen pages of the statute-book, into one of 92 sections, covering 32 pages.

The right and privilege which the Separate Schools Act conferred when the Imperial enactment became law, and which the Separate Schools Acts have ever since conferred, and still confers, was and is a right to separation, to separate public schools of the like character, and maintained in the like manner, as the general public schools. The machinery may be altered, the educational methods may be changed, from time to time, to keep pace with advanced educational systems. It was never meant that the separate schools, or any other schools, should be left forever in the educational wilderness of the enactments in force in 1867. Educational methods and machinery may and must change, but separation, and equal rights regarding public schools, must remain as long as provincial public schools last, unless the Federal or Imperial Parliament, whichever may have the power, decrees otherwise.

The modern fashion of applying the short name "public schools" to the general public schools, which were in earlier days called the "common" or "union schools," and more appropriately so called, and of applying the short name "separate schools" to the particular public schools separated from the general ones under the Separate Schools Act, is no excuse for misunderstanding their true character of, all alike, public schools, maintained in the public interests and for the public welfare.

The rocks upon which it was said that the Ottawa Separate Schools came near to foundering are said to be: the appointment of an inspector who was not a Roman Catholic, and an overruling of the Board's desires as to the language to be used in

teaching. Whether these things were necessary or unnecessary, gracious or ungracious, is a matter that does not in any way affect the legal question involved in these actions; if they were lawful, the plaintiffs' appeal should not be to those who expound the law, but to those who make it, or to those who elect the makers, in regard to any grievances they may feel that they have. That these things were not unlawful, the main purpose of public schools, and the very words of the Separate Schools Act, which I have read, seem to me to make very plain; and, beside that, the judgment of the highest Court of this Province has decreed that they were lawful: *Mackell v. Ottawa Separate School Trustees*, 34 O.L.R. 335.

The removal of trustees who fail or refuse to perform the duties of their office, and especially so when they do so contumaciously, is but a familiar, appropriate, and sometimes necessary legal method; and for a High Court of Parliament, Provincial or Federal, to remove trustees filling a public office, even though elected to that office, and the more so if elected with a view to continuing to refuse or fail to perform such duties in the face of a judgment of a Court of competent jurisdiction, making those duties plain, could not be an infringement upon any legal right, but must be an endeavour to maintain and enforce it; and the mere fact that an appeal may be taken, or is contemplated, against such judgment, is no kind of excuse for disregarding it, unless its effect is suspended, during the appeal, by law, or by a competent Court; the only legal and proper course, especially for a public officer, is to yield obedience to that judgment until it is reversed, if ever it should be; and that the plaintiffs should have done, and in doing would have remained in office.

I am quite in accord with Mr. Belcourt, in his contention that no case, that was cited, governs this case; and in regard to the observations attributed to Lord Justice Mellish, when sitting in our ultimate appellate tribunal, read by Mr. Young from Wheeler's Confederation Law of Canada, at p. 366, to the effect that he could find nothing in the first sub-section of sec. 93 of the Imperial enactment preventing the abolition of Separate Schools in this Province, it ought hardly to be necessary to point out that the word "first" is but a misprint for the word "second;" there could hardly be an expression of such an opinion as long as public schools exist, because it would be in the teeth of the first sub-

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section; but it seems to me to be quite plain, too, that the Legislature of this Province has power to abolish all public schools, and so abolish separate schools, for then there would be nothing to be separated from, and so no right or privilege of separation; but that is out of the question; it is not the abolition of public schools, but it is their increase, at enormous cost, that is likely to trouble future generations, as it does some of them who are of the present generation.

*Actions dismissed with costs.*

[MEREDITH, C.J.C.P.]

FRY AND MOORE v. SPEARE.

*Limitation of Actions—Tenants in Common—Possession by one Tenant—Stepmother of Co-tenants—Question whether Possession Held for All—Presumption—Question of Fact—Evidence—Limitations Act, R.S.O. 1914, ch. 75, sec. 5—Application for Partition—Trial of Issue—Costs.*

There is no irrebuttable presumption, in the case of parent and infant child entitled to undivided shares in land as tenants in common, that the parent in possession holds as "bailiff" in respect of the share of the child out of possession; the question for whom the possession was taken and held is always a question of fact, though ordinarily the finding should be that the possession of the parent is that of the child.

It was *held*, in this case, upon the evidence, in an issue tried between the parties, that the plaintiff therein, the stepmother of the defendants, had acquired, under the provisions of the Limitations Act, title to the rights and interests of the defendants, by length of possession—her possession being for herself, and not as their bailiff.

A motion for partition, made by the stepchildren, out of which the issue arose, was dismissed with costs. No costs of the trial of the issue were allowed, because the trial was unnecessary, there being no material question of fact really in dispute.

MARY IRENE FRY and Dollena Moore, as plaintiffs, applied, upon notice to Christina Ellen Speare, as defendant, for an order for partition or sale of land in the town of Southampton; and upon the application an order was made directing that the plaintiffs and defendant proceed to the trial of an issue, wherein Christina Ellen Speare should be plaintiff and Mary Irene Fry and Dollena Moore should be defendants, and that the question to be tried, should be, whether the plaintiff in the issue had acquired title to the land by virtue of the Limitations Act.

October 9. The issue was tried by MEREDITH, C.J.C.P., without a jury at Walkerton.

D. Robertson, K.C., for the plaintiff in the issue.

*W. H. Wright and D. Forrester*, for the defendants in the issue.

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November 19. MEREDITH, C.J.C.P.:—But for the cases referred to by Mr. Wright\* I should have thought this case a simple and plain one, depending entirely upon a question of fact which ought to be found in the plaintiff's favour; and time taken for a more careful consideration of those cases enables me to say that none of them stands in the way of giving effect to that view.

The case, though coming on for trial in the form of an issue, is substantially an action to recover land from the plaintiff in the issue; and the law is, that no such action shall be brought but within ten years next after the time at which the right of action first accrued to the person bringing it: The Limitations Act, R.S.O. 1914, ch. 75, sec. 5.

The defendants first became entitled to undivided shares in the land in question upon their father's death in 1892, twenty-three years ago; and so their claim to the land would long since have become ineffectual, unquestionably, but for the contention which they now make, that they have ever since been in possession through their stepmother, the plaintiff in this issue; she having had actual possession in person and through her tenants, also unquestionably, during the whole time since the death of her husband and the defendants' father, in the year 1892; except for the possession of half of the land by her present husband, she living with him, since the year 1899.

The defendants' contention is, substantially, that, because the plaintiff is their stepmother, the law permits of no other conclusion than that her possession was merely as their "bailiff" as to their shares in the land; but I cannot consider that there is any such irrebuttable presumption. It must always be a question of fact for whom the possession was taken and held, and ordinarily the finding should be that the possession of the parent is that of the child, for parents do not ordinarily take undue advantage of their children, and generally, as in this case at the first, at all events, the children accompany them in their possession, or are maintained by the parent in whole or in part out of the profits of the land; and it is right to attribute possession to the person law-

\*All the cases collected in Simpson on Infants, 3rd ed., pp. 99-102, and *Kent v. Kent* (1890-92), 20 O.R. 158, 445, 19 A.R. 352.

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fully entitled to it when the circumstances of the case will warrant it.

I have found no case in which the decision of it required more than that, or in which it can be said that there was no evidence to support the judgment in favour of the child: and no law, nor any Court, can compel Judge or juror to find that to be true which is false.

In this case the stepmother and stepchildren, and mother and child, with the exception of the stepchild Dollena, who lived with her grandmother in the United States of America, continued, after the husband and father's death, to live on the land for nearly a year, when they went to the home of the plaintiff's mother, in this Province, and remained there for a couple of months, and then went to the stepchildren's grandmother in the United States of America, where the child Dollena was, and all lived together there with the grandmother and a brother and sister of the children's father, the plaintiff contributing towards the household expense that share which was by agreement between them to be borne by her; and that state of affairs continued until the year 1895, when the plaintiff returned to the land in question, bringing with her her own child only, the stepchildren being left with their grandmother and uncle and aunt in the United States of America, where they have ever since lived.

In the year 1897, the plaintiff married again, and went, at first, with her husband to live in Hamilton, in this Province; but, in the year 1899, they, and her child by the first marriage, went to the land in question to live there, and have ever since lived upon it.

The plaintiff has ever since the separation from her stepchildren, in the year 1895, dealt with the land just as she would have done were it her own. She has paid off a mortgage upon it, made by her first husband, for an amount nearly half the full value of the land, has completed the building of one of the houses which was not finished when her first husband died; has made repairs and paid taxes, and has received all the rents which were paid: and has always had the land assessed in her own, or her present husband's, name.

No other finding can be made than that, up to the time of the separation from the stepchildren in the year 1895, the possession of the plaintiff was the possession also of all the children, as well

as of herself in virtue of any right she might have in or to the land.

But to find as a fact, with any regard for the truth, that, after the separation, in the year 1895, and the more so after the second marriage, in the year 1897, and the re-occupation of the land by the plaintiff, with her second husband, in the year 1897, the possession of the plaintiff was, in any sense, that of any of the stepchildren, is impossible.

She had removed them from the land and had separated herself from them completely, leaving them, and their care and interests, entirely in the keeping of their paternal relations.

She had deprived them of all use and benefit of the land and of any voice in the management or control of it; and had converted to her own use, and that of her own child, all its rents and profits; and subsequently gave over the possession and control of half of it to her second husband, who has had such possession and control since the year 1899.

These acts spoke louder than words of the plaintiff's repudiation of any agency for the stepchildren, and of any concern in the land except in her own interests and the interest of her own child and second husband.

To hold that she was all along and still is their "bailiff" or other representative, and so more than all along acknowledging the right of the stepchildren to a share in the land, would be a palpable perversion of the truth, which no law can require. Since the separation there has been neither act nor word, nor any circumstance, indicating any kind of service or agency on the stepmother's part. Every act, circumstance, and word indicate the contrary, indicate only complete exclusion of all the stepchildren from any part or lot in the possession or control of the land and from any benefit from the rents and profits of it. They were out of possession and she was in possession for much more than five years after each became of age: see *In re Maguire and McClelland's Contract*, [1907] 1 I.R. 393; which contains the latest, and, as I think, most rational, exposition of the law on the subject.

It was never the legal duty of the stepmother to occupy and hold the land for the stepchildren; and, if it had been, there was a repudiation and breach of that duty in taking from the stepchildren all the benefits of it and converting it to her own use, a

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thing which called for legal action upon their parts to recover their property, which action, being delayed until these proceedings were commenced in the year 1915, although the youngest of the step-children attained full age in the year 1904, is too late.

The statutes of limitations make explicit provisions for the cases of infants and of tenants in common; and neither case nor Court, nor Judge or juror, can add to, or take away from, them, rightly: nor openly disregard, nor by false findings of fact, or other subterfuge or pretence, circumvent them, lawfully.

I find the issue tried between the parties to this matter in favour of the plaintiff therein; that—her husband assenting—she has acquired title to the rights and interests of the defendants in the issue, in the land in question, by length of possession, under the provisions of the Limitations Act; and, treating this trial as also a motion for the final disposition of the matter, I direct that the motion for partition be dismissed with costs, but without costs of this trial, which was quite unnecessary. There was no material question of fact really in dispute. There was no reasonable ground for raising any contest over any such fact, and so no excuse for failing to present the facts as they are, and were known to be, in the first instance; and having had the application finally disposed of then. The costs of the motion should be taxed as if that had been done.

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Nov. 20.

[MIDDLETON, J.]

CLELAND v. BERBERICK.

*Land—Right of Land-owner—Lateral and Subjacent Support—Interference with Natural Condition—Excavation and Removal of Sand from Adjoining Lot—Operations of Nature Facilitated by Wrongful Act—Damages.*

The right of the owner of land is, to have it left in its natural plight and condition without interference by the direct or indirect action of nature facilitated by the direct action of the owner of the adjoining land. Each land-owner must so use his own land that he shall not interfere with or prevent his neighbour enjoying the land in its natural condition. The right is more properly described as a right of property than as an easement; and it has been applied not only to the case of lateral but of subjacent support.

*Dalton v. Angus* (1881), 6 App. Cas. 740, 791, 808, *Jordeson v. Sutton South-coates and Drypool Gas Co.*, [1899] 2 Ch. 217, and *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594, followed.

This principle was applied in a case where the plaintiff and defendant owned adjoining lots of land having upon them a sandy beach, and the destruction of the plaintiff's property was brought about by the act of the defendant in removing sand from his lot, so that the action of the wind and water in washing away a large portion of the plaintiff's sandy beach was facilitated; and the plaintiff had judgment for \$750 damages.

**ACTION** for damages for injury to the plaintiff's lands and premises by the defendant's wrongful acts in removing sand from his adjoining lands and premises.

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November 3. The action was tried by MIDDLETON, J., without a jury, at Hamilton.

*J. G. Gauld, K.C., and R. W. Treleaven, for the plaintiff.*

*H. S. Robinson, for the defendant.*

November 20. MIDDLETON, J.:—VanWagner's beach, on the shore of Lake Ontario, near Hamilton, is a place where summer residences have been erected. The plaintiff and the defendant are neighbours.

Prior to the spring of the present year, the plaintiff's property sloped down to the water of the lake in such a way as to leave a sandy beach, which afforded much pleasure to him and his family. The defendant drew a large quantity of sand from his adjoining lot, and the defendant's wife, who apparently owns the lot next adjoining, also drew sand from her lot. In the result, the storms have washed away a large portion of the plaintiff's sandy beach, and the line of high ground has been carried back some 50 feet towards his house. This year, the water of the lake is much lower than usual, so that about the same distance as had existed theretofore is left from the road on the other side of the plaintiff's property to the actual water-line; but the beach has been made much wider, and, owing to the fact that the sand has been carried away by the action of the water, and the gravel has been left behind, this beach is of comparatively little use; and upon the water rising to its normal level the lot will have been made of somewhat less depth than before.

The photographs filed shew the way in which the shore has been encroached upon by the action of the elements. The plaintiff's case is that this destruction of his property has been brought about by the act of the defendant in removing the sand and bank from his own property, so that the action of wind and water has been greatly facilitated. The defendant denies this, and seeks to minimise the amount of sand taken from his property, and to pass on responsibility for the destruction of the land to his wife and those owning property beyond, where even more serious interference with the natural conditions had taken place.



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Upon the evidence, I have come to the conclusion that a great deal more sand has been taken from the defendant's property than he admits, and that the excavation done upon his property is, to a considerable extent, responsible for the inroad upon the plaintiff's land.

The question of the legal responsibility of the defendant for the consequence of his conduct appears to me to be by no means free from difficulty. No cases were cited by either counsel dealing with the precise point in hand, and I have found none; but the general principle involved appears to me to be clear, and is nowhere better expressed than in the classic judgment of Lord Chancellor Selborne in *Dalton v. Angus* (1881), 6 App. Cas. 740, at p. 791: "In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet*. All existing divisions of property in land must have been attended with this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo, ut alienum non lædas*." To the same effect is what is said by Lord Blackburn, p. 808: "This right is, I think, more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a restriction on the mode in which the neighbour is to use his land."

This principle has been given wide application, and has been applied not only to the case of lateral support but to subjacent support, even to the case of subjacent support by running silt: *Jordeson v. Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; and semi-fluid pitch: *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594.

The latter case is in some respects very like this. There, it is

said by a witness, "Pitch bulges out, and they shave it off every morning. That is the plan adopted when you want to dig your neighbour's pitch." Here the plan adopted when you want the benefit of your neighbour's sand is, evidently, to sell your own and trust that the action of nature will fill the void from your neighbour's property.

Broadly speaking, the right of the owner of land is, as I understand it, to have that land left in its natural plight and condition without interference by the direct or indirect action of nature facilitated by the direct action of the owner of the adjoining land. Each land-owner must so use his own land that he shall not interfere with or prevent his neighbour enjoying the land in its natural condition.

The damage done to the plaintiff's property has given me some anxious consideration. In the result, I have concluded to allow \$750; and there will be judgment for that sum, with costs.

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K. AND S. AUTO TIRE CO. LIMITED v. RUTHERFORD.

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*Guaranty—Indefinite Basis of Contract—Increase in Liability—Release of Guarantor—Absence of Prejudice and Concealment—Duty of Disclosure—Variation of Sealed Contract by Unsealed Instrument—Construction and Scope of Contract.*

The defendant signed two guaranties in favour of the plaintiffs. The first was under seal, and was to operate upon the formation of a new company to take over the business of two other tire companies. The second writing was dated 20 days later, and was not under seal. It was in the form of a letter, addressed to the plaintiffs, stating that the defendant understood that a new company was not to be incorporated, and that "our agreement will hold good" for the K. company, one of the two existing tire companies, "just as if you had incorporated a new company." The plaintiffs bought control of the K. company, which had previously taken over the assets and assumed the liabilities of the other tire company; and the K. company, with a new directorate, made an agreement with the plaintiffs by which the former should have the exclusive agency in Quebec for certain goods controlled by the plaintiffs. The amount to be paid for this exclusive agency was \$13,350, which was to be satisfied by the transfer to the plaintiffs of 91 shares of the K. company and the payment of \$4,250, and promissory notes for the \$4,250 were made by the K. company in favour of the plaintiffs:—

*Held*, upon the evidence, that the arrangement by which the K. company purchased the agency for \$4,250 was a device by which the plaintiffs were to be recouped out of the profits of the business for the amount paid out to acquire control of the stock of the K. company; but that did not affect the liability of the defendant. It was said that this increase in the liabilities of the K. company changed the basis of the defendant's contract, and so released him; but the basis of the contract was not fixed and definite;

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- nothing was done to prejudice the defendant; there was no deliberate concealment; there is no universal obligation to make disclosure in cases of guaranty; and the defendant was not released.
- Holme v. Brumskill* (1877), 3 Q.B.D. 495, distinguished.
- Stewart v. McKean* (1855), 10 Ex. 675, *Webster v. Petre* (1879), 4 Ex. D. 127, *Stewart v. Young* (1894), 38 Sol. J. 385, and *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469, applied and followed.
- (2) The words of the later guaranty "just as if you had incorporated a new company" meant "to the full extent contemplated in case a new company had been incorporated," and substituted another state of affairs, upon the completion of which the earlier guaranty became effective; and the later guaranty was not limited to so much of the earlier one as dealt with the indebtedness of the K. company recited therein.
- (3) A guaranty need not be under seal; and *quære* whether the rule that an attempted alteration of a contract under seal by an instrument not sealed is ineffective, is applicable where the original contract does not require a seal to make it valid.
- (4) The guaranties did not cover the notes given for the acquisition of the exclusive agency; the contract of guaranty is *strictissimi juris*.

ACTION upon two guaranties signed by the defendant.

The action was tried by HODGINS, J.A., without a jury, at Toronto.

*Leighton McCarthy*, K.C., for the plaintiffs.

*George Wilkie*, for the defendant.

November 23. HODGINS, J.A.:—The amendment to paragraph 5 of the statement of claim, asked for at the trial, is granted.

The action is upon two guaranties signed by the defendant in favour of the plaintiffs, dated the 7th February, 1914, and the 27th February, 1914, both set out in the pleadings. They are as follows:—

"Whereas the Kelly Tire Company Limited, heretofore carrying on business in Montreal, is indebted to the K. and S. Company in the sum of four thousand dollars, and the MacDonell Tire Company, also carrying on business in Montreal, is indebted to the K. and S. Company in the sum of twenty-eight hundred dollars.

"And whereas a new company is about to be incorporated, under the name of "Motor Tire Limited," or such other name as may be given to it (hereinafter called the new company), for the purpose of taking over the business of the Kelly Tire Company and the MacDonell Tire Company.

"And whereas the K. and S. Company has agreed to supply goods to the new company upon the guaranty of the said Rutherford as hereinafter mentioned.

"Now it is witnessed:—

"That the said Rutherford, in pursuance of the premises and in consideration of the K. and S. Company supplying goods to the new company from time to time to such extent and on such terms of credit as the K. and S. Company shall think fit, doth hereby guarantee to the K. and S. Company the payment to it of the said sum of four thousand dollars now owing by the Kelly Tire Company and the sum of twenty-eight hundred dollars now owing by the MacDonell Tire Company, and any interest at the usual bank rates on any extension of the payment of the said sums, and doth also guarantee to the K. and S. company payment for all goods which may be sold by the K. and S. Company to the new company, and the due payment of all paper notes, or other collateral which may be at any time given to the K. and S. Company or held by it in respect of the said indebtedness or for goods to be supplied as aforesaid upon which the new company shall or may be liable.

"This guaranty shall be a continuing guaranty for the benefit of the K. and S. Company and its assigns to the extent of fifteen thousand dollars in addition to the sums now owing by the Kelly Tire Company and the MacDonell Tire Company as aforesaid, and shall extend to and be security for all and every sum or sums of money to the extent aforesaid which shall or may at any time be due from the new company to the K. and S. Company over and above any moneys which shall be received from the said new company or which may be realised from any securities which the K. and S. Company hold or may hereafter hold in respect of any such indebtedness.

"The K. and S. Company shall have the right at any time to refuse credit to the new company, and to release any collateral or other securities, extend the time for payment to the new company, or to any person liable upon any collateral or other security which the K. and S. Company may at any time hold, or compromise or compound with the new company or with any other person liable as aforesaid without notice and without affecting or discharging the liability of the said Rutherford.

"And the said Rutherford further agrees with the K. and S. Company as and when required to endorse the notes and other paper of the Kelly company, the MacDonell company, or the new

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company, in respect of the present indebtedness, or to endorse the notes or paper of the new company or of its customers in respect of the new company's future indebtedness to the K. and S. Company, and to guarantee the bankers of the K. and S. Company, on the usual guarantee forms of such bankers, in respect of any sums owing as aforesaid to the extent aforesaid as may be from time to time required by the K. and S. Company.

"In witness whereof the said Samuel J. Rutherford has hereunto set his hand and seal."

(Dated the 7th February, 1914, and signed, sealed, and witnessed accordingly.)

"Toronto, Ont., Feb. 27th, 1914.

"K. and S. Auto Tire Co. Ltd., 527 Yonge Street, Toronto.

"Gentlemen: Owing to financial reasons, I understand it is not your intention to have the name of the Kelly Tire Co. Ltd., of Montreal, Quebec, changed, or a new company incorporated. Our agreement of the 7th February will hold good for the Kelly Tire Co. Ltd. just as if you had incorporated a new company.

"Yours truly,

"S. J. Rutherford."

The defendant is in business in Toronto as a manufacturer of glass, and is a brother-in-law of James B. McLaren, who appears in the transactions preceding and following the giving of these guaranties. The MacDonell Tire Company and the Kelly Tire Company were Montreal concerns, neither very prosperous, and McLaren was in the former until the 10th February, 1914, when he became manager of the latter. While engaged in the MacDonell Tire Company, he became desirous of acquiring the Kelly Tire Company and getting the agency for the plaintiffs' goods, and, after some negotiations with Mr. Stanyon, president of the plaintiffs, interested the defendant in the matter.

The arrangement which led up to the signing of the first guaranty was discussed at the Mossop Hotel, in Toronto, in the latter end of December, 1913, when Stanyon, McLaren, and the defendant were present. The defendant was called in by his brother-in-law, and his assent was gained in order to help him. The defendant appears to have been rather easy-going in his methods of business; and, throughout, he has done what he was

asked to do without much question or inquiry. He details the conversation in the Mossop Hotel.

Stanyon, according to him, stated that the Kelly Tire Company owed the plaintiffs considerable money, and was in difficulties, and that he, Stanyon, could get control of the stock, but the company itself was in bad odour, and that another name would be advisable. Stanyon also mentioned that he would give the agency to the new company, but said nothing about charging therefor. The defendant says that in the discussion about the new company he was asked to take 100 shares, but declined, and that McLaren, who wanted stock in it, suggested taking 100 shares and paying for it as he could. Further, the defendant said that, if he could guarantee so that they could raise money at the bank, he would be pleased to do so.

It appears ultimately to have been agreed that a new company was to be formed to take over the MacDonell Tire Company and the Kelly Tire Company. The plaintiffs were creditors of both, and McLaren was to become manager of the new company, after it absorbed both the other companies. The difficulty was, as usual, money; and the defendant finally became the backer of the project as guarantor to provide this essential for carrying on the new venture. Stanyon was to get control of the Kelly Tire Company, and the assets of that company were to go to the new company to pay up his stock therein; McLaren was to get stock, and was to pay for it later, as he was able.

The project was ultimately carried out in Montreal on the 10th February, 1914, by Stanyon, O'Mara, and McLaren. Before Stanyon went to Montreal, he asked for and obtained the first guaranty. While there, these parties, during the negotiations, found out that to incorporate a new company would be expensive in several ways, and decided to acquire the Kelly Tire Company and let it continue in business.

The plaintiffs, therefore, bought control of that company, which had previously taken over the assets and assumed the liabilities of the MacDonell Tire Company. This was effected by the purchase from one Smith and his associates of 290 shares in the Kelly Tire Company, out of a total of 500 shares. The price of these shares was agreed at \$4,250, and the plaintiffs gave twelve notes in favour of Smith for varying amounts, spread

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over twelve months. These notes were handed over to Smith, and the stock was duly transferred. When this was done, and the directorate of the Kelly Tire Company consisted of Stanyon, O'Mara, McLaren, MacDonell, and a brother of McLaren, the Kelly Tire Company made an agreement with the plaintiffs by which the former should have the exclusive agency in the Province of Quebec for certain goods controlled by the plaintiffs, namely, the Kelly Springfield Tire Company's products, Horsey patches, Racine tires, and other articles. The amount to be paid for this exclusive agency was \$13,350, which was to be satisfied by the transfer to the plaintiffs of 91 shares of the Kelly Tire Company and the payment of \$4,250. This was carried out, but the notes for this latter \$4,250, which were originally intended to correspond with those given to Smith, were made out in the form of three notes for \$1,466.66 each, payable in four, eight, and twelve months. These notes were made by the Kelly Tire Company in favour of the plaintiffs, and are now in their possession. The 91 shares, when transferred, gave the plaintiffs a holding of 381 shares, which they directed to be divided as follows: 128 shares to the defendant; 253 shares to the plaintiffs; providing, at the same time, that the shares held by the plaintiffs should, in ranking for dividends, be treated as being only 123 shares, so that the plaintiff company and the defendant would be practically on an even footing as to dividends. The defendant says he did not know of this transfer to him, but McLaren knew, and a certificate in favour of Rutherford was received by McLaren and put among the latter's papers in the safe in his office at Montreal.

On the return of the parties to Toronto, an agency contract was sent down to the Kelly Tire Company, which has disappeared. It was never signed, but a document purporting to be a copy of it was produced, and it appears to have been, with slight differences in the prices or discounts, but as an exclusive contract in the Province of Quebec, excepting the city of Hull, acted on by both parties since that date, although not formally signed.

After the return of Stanyon and O'Mara from Montreal, leaving McLaren in charge as managing director and treasurer, the second guaranty was obtained, owing to the project having been changed from the formation of a new company to the carrying on of the old Kelly Tire Company.

The substantial objection, as urged, to the method adopted of acquiring control of both companies and installing McLaren as manager, is, that the cash price paid for the majority stock of the Kelly Tire Company, i. e., \$4,250, was in effect added to the liabilities of the Kelly Tire Company. There is little doubt that the arrangement by which the Kelly Tire Company purchased the desired agency for the Springfield tires, etc., for \$4,250, was a device by which the plaintiff company would be recouped out of the profits of the business for the amount paid to Smith for the majority stock.

But I am unable to see how that fact affects the liability of the defendant.

The Kelly Tire Company legally made itself liable for \$4,250 in order to arrive at an arrangement to increase its volume of business; and, when that arrangement was concluded and acted upon, it received value therefor.

The rights of majority shareholders are far-reaching, and not always fair to the minority, but here no shareholder is involved. The complaint made is, that this increase in the liabilities of the Kelly Tire Company was of moment to the guarantor, and that it changed the basis of his contract, and so released him.

This argument overlooks the fact that the basis of the contract was not fixed and definite as in *Holme v. Brunskill* (1877), 3 Q.B.D. 495, but was nebulous in the extreme, and contemplated the acquisition of two companies, and the launching of a new venture under the management of McLaren, with money provided on the credit gained by the guaranty. No stipulations were exacted, but the whole matter was left to shape itself in the way finally adopted by the negotiators. The defendant admits that the assets of the Kelly Tire Company were to go to the plaintiffs to pay for the acquisition of the majority stock; and the plan finally settled upon carried this out in effect, and indeed was more favourable to the defendant. There was no idea in what was done of prejudicing him. The \$29,000 of stock was divided between the plaintiffs and McLaren, and the latter's share was, at McLaren's request, put in the defendant's name, and the plaintiffs agreed to allow the dividends to go equally upon both portions. The final arrangement put McLaren, his brother, and McDonell in as directors of the Kelly Tire Company; and, Stanyon says, they

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represented the defendant's interests and controlled the directorate.

I cannot find that there was any deliberate concealment. It seems reasonably clear that it was intended to make the Kelly Tire Company, out of its profits, provide the amount paid for the stock. McLaren, on whose behalf the defendant went into the matter, was involved in the transaction, knew it all, and helped to carry it out. The defendant admits that McLaren was trying, in the original negotiations, to arrange with Stanyon so that he could handle in Quebec the tires controlled by the plaintiffs. McLaren was free to communicate with the defendant, so that those representing the plaintiffs had no opportunity to deceive the defendant, even if they had desired to do so. McLaren further admits that nothing was withheld from him, and that he did nothing but what was right to the defendant. Stanyon and O'Mara assert that they did communicate everything to the defendant; and I think the circumstances corroborate their evidence, and that the defendant, on whom I cast no reflection, must have forgotten or paid little attention to details which had McLaren's concurrence. The statement made by Stanyon that the defendant requested them not to write letters to him, as he did not want his connection with them to become public, was not denied by the defendant. The only thing changed which had been at all definitely stated, viz., the formation of a new company, was communicated to the defendant practically at once, and the second guaranty was given to approve the alteration.

The subsequent actions of the defendant bear out the view I have taken as to his position. In June of 1914, he went to Montreal with Stanyon and O'Mara, to assist McLaren to get banking facilities for the Kelly Tire Company. They tried but were not able to make any arrangements. He frequently discussed the finances with Stanyon and O'Mara. He was shewn statements, though not itemised ones, which he did not read over. He gave them in May, pursuant to his guaranty, a \$6,000 note, and in July two notes for \$5,000 each. It should not be overlooked that on paper the Kelly Tire Company looked prosperous, and that, although Stanyon at the end of December said the company was in difficulties, McLaren was aware, when the company was taken over, that the statement which had been got from independent

auditors shewed an apparent surplus, and Stanyon says he acted upon the statement and on Smith's representations in purchasing the stock.

The agency might well have been considered by McLaren to be a profitable one and one worth paying for, because the cancellation of a previous agency contract with the Kelly Tire Company had caused their business to fall off, between August and December, from \$3,000 or \$4,000 per month to \$700 per month.

The conclusion I have reached is, that there never was any clear and definite basis stated on which the guaranties were based, but that the idea under which all parties acted was that the plaintiffs and McLaren were to make such arrangements as they could to effectuate the end in view; and that whatever those arrangements necessitated would be acceptable to the defendant; his point of view being that McLaren would act in his interest in the matter. The case must be decided upon the principle illustrated by such cases as *Stewart v. McKean* (1855), 10 Ex. 675, *Webster v. Petre* (1879), 4 Ex. D. 127, and *Stewart v. Young* (1894), 38 Sol. J. 385, where the basis of the contract was indefinite and lacked the precision which would enable a departure from it to be readily ascertained. There is no universal obligation to make disclosure in cases of guaranty: *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469.

Mr. Wilkie argued that the guaranty of the 27th February, 1914, was an attempted alteration of a contract under seal by an instrument not sealed, and, that being ineffective, the original guaranty remained as expressed, and, owing to the changed conditions, did not bind the defendant.

The answer to that contention is this: if the original guaranty was to operate only on the formation of a new company, then it was competent for the parties to change that condition and to agree to substitute a new state of affairs, which, upon completion, caused it to become effective. A guaranty need not be under seal, and the reason for the rule asserted, if now existent, is absent in cases where the agreement, though under seal, is not one which requires a seal to make it valid.

It was further contended that the later guaranty included only so much of the earlier one as dealt with the indebtedness of the Kelly Tire Company recited therein, viz., \$4,000. I do not

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think this is the correct construction of the letter of the 27th February, 1914. The words "just as if you had incorporated a new company" mean, I take it, to the full extent contemplated in case a new company had been incorporated.

But I do not think the guaranties extend to cover the three notes (forming exhibit 4) given for the acquisition of the exclusive agency. Both in the recital and in the obligation the liability is limited to payment for goods to be supplied, and these notes are not included in that description. The contract of guaranty is *strictissimi juris*, and the defendant is entitled to object to anything not expressly mentioned therein.

On the whole case, I am of opinion that judgment must be entered for the plaintiffs, with a reference to the Master in Ordinary to take the accounts. In that reference the Master is to have regard to the fact that the two sums of \$2,800 and \$4,000 are admitted as being due on that date, but the defendant will have the right to shew that since then they have been reduced either by payment or by set-off, or by allowances, if the allowances have been made upon a basis existing prior to or at the date of the guaranty. On the reference, of course, the Master must disregard the Smith notes, which appear to have been improperly charged up to the Kelly Tire Company, as well as the three other notes, exhibit number 4, which notes, as I have said, are not properly chargeable under the guaranty.

The plaintiffs should have their costs up to and including the trial. Further directions and costs of reference will be reserved.

Under the order made by me at the opening of the case, on the motion for directions, the third party is to be bound by the account, while its liability is to be the subject of subsequent trial.

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*Banks and Banking—Obligation of Bank on which Cheques Drawn by Customer to Bank Holding Cheques—Effect of Clearing House Transaction—Costs of Former Litigation.*

A customer of the defendant bank drew certain cheques upon it, which were endorsed by the payees to the plaintiff bank; the cheques went through the Toronto Clearing House in the ordinary way; and, upon presentation to the defendant bank, were dishonoured. The plaintiff bank, being admit-

tedly the lawful holder of the cheques, sued the defendant bank to recover the aggregate amount of the cheques, less payments made thereon, and was *held*, entitled to recover, upon the ground that there was money standing to the credit of the drawer of the cheques at the time they were presented, or that there would have been such money but for the improper acts of the defendant bank; and that it was, therefore, the duty of the defendant bank, which had received the cheques through the Clearing House, to have marked them good and to have treated them as paid.

The effect of the transaction in the Clearing House explained.

When the defendant bank, by virtue of the Clearing House transaction, had itself become the holder of the cheques, it had no right, so long as it had or ought to have had funds to answer the cheques, to demand recoupment from the depositing (plaintiff) bank; and the recoupment was obtained by what was in truth a misrepresentation of the real state of affairs.

*Quære*, whether, when a customer draws a cheque upon his bank, and there are funds to answer it when presented, the bank should be at liberty to refuse to honour it, retaining the money to meet some demand of its own which has not yet matured, or to pay some other cheque drawn by the customer; or whether, when cheques come in through the Clearing House, in one bundle, which in the aggregate exceed the amount of the customer's credit, the bank should be at liberty to determine which should be paid and which rejected.

*Held*, that the plaintiff bank was not entitled to recover from the defendant bank the costs incurred in unsuccessful actions brought against the endorers of the cheques.

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ACTION by the plaintiff bank, as holder of five cheques drawn by Maybee & Wilson upon the defendant bank, to recover the sum of \$2,918.23, being the aggregate amount of the cheques, less payments made thereon, and interest, and also to recover \$1,836.23, being the amount of costs incurred in litigation with the endorers of the cheques: see *Bank of British North America v. Haslip*, *Bank of British North America v. Elliott* (1914), 30 O.L.R. 299, 31 O.L.R. 442.

October 22. The action was tried by MIDDLETON, J., without a jury.

*W. N. Tilley*, K.C., and *G. L. Smith*, for the plaintiff bank.

*Wallace Nesbitt*, K.C., and *R. Wardrop*, for the defendant bank.

November 24. MIDDLETON, J.:—This action is the aftermath of the actions of *Bank of British North America v. Haslip* and *Bank of British North America v. Elliott*, 31 O.L.R. 442. The questions which now arise between the banks are, however, entirely different from anything involved in the earlier decisions.

Maybee & Wilson were customers of the Standard Bank, at its branch at the corner of King and West Market streets, Toronto. They issued five cheques which are now in question, upon the account of that bank: the first, dated the 30th September, 1913,

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in favour of T. Haslip, \$1,864.49; the second, dated the 1st October, 1913, in favour of N. Stevens, \$1,150.48; the third, dated the 1st October, 1913, in favour of William Watson, \$1,666.77; the fourth, dated the 1st October, 1913, in favour of A. Stephens, \$1,006.75; the fifth, in favour of Elliott, dated the 1st October, 1913, \$1,041.03; making a total of \$6,729.52.

The plaintiff bank has received dividends from the assignee of the estate of Maybee & Wilson, and has received the full amount of the Stevens cheque, so that the total liability now remaining in respect of all these cheques has been reduced to \$2,918.23. In addition to this amount, a claim is made for \$1,836.23, being the amount of costs incurred in litigation with the endorers of the cheques. All these five cheques were endorsed by the payees to the plaintiff bank, the Bank of British North America; and it is now admittedly the holder of the cheques.

The cheques were deposited in a sub-branch of the West Toronto branch of the plaintiff bank, on the 1st October, 1913, and were put through the Clearing House in the ordinary course, and were received by the defendant bank at its main office on the morning of the 2nd October, and at its St. Lawrence Market branch (about a quarter of a mile from the main office) early in the morning of the 3rd October. The cheques were held until just before noon on the 4th October, when they were returned to the plaintiff bank unaccepted, and marked "not sufficient funds." The plaintiff bank thereupon gave a Clearing House slip, which is equivalent to cash, to take up the cheques.

This action is brought upon the theory that there was money standing to the credit of Maybee & Wilson at the time the cheques were presented, or that there would have been such money save for the improper acts of the defendant bank; and that it was, therefore, the duty of the defendant bank, which had received the cheques through the Clearing House, to have marked them good and to have treated them as paid.

The ledger account of the firm of Maybee & Wilson at the Standard Bank is produced, and it discloses this state of affairs. According to the ledger, on the morning of the 3rd October there was a credit balance of \$470.37. The first entry is a deposit, shewn by evidence to have been made between 11 and 12 o'clock that morning, of \$6,390.07. This made the credit balance

\$6,860.44. The first debit is an item marked "Boucher," \$1,691.69; then follow four items which are identified as cheques held by the Dominion Bank and by the Bank of Toronto. These are \$616.60, \$2,602.59, \$551.11, and \$1,897.07. This more than exhausted the credit balance. Some small cheques were then marked, making at the end of the day an overdraft of \$1,044. On the morning of the 4th there was a credit item, a charge for interest on overdraft, and a cheque was accepted in favour of "E. Maybee trust account" for \$394.22, to balance the account.

In arriving at the balance with which the account of the morning of the 4th was opened, there had been charged up against Maybee & Wilson two sums, \$2,166.20 and \$2,676.85, representing what are known as "the Porter drafts."

If all these debit items are properly chargeable against the account, then manifestly there were not funds sufficient to pay any of the cheques in question.

The propriety of the debit items charged up as representing the Porter drafts, and of the item marked "Boucher," and of the items representing the cheques held by the Dominion Bank and by the Bank of Toronto, is challenged.

The first Porter draft is one made by Maybee & Wilson upon Porter Brothers, Burlington, Ontario, on the 26th July, 1913, payable two months after date; so that it would fall due on the 29th September. The second Porter draft is drawn at two months on the 8th August, 1913, by Maybee & Wilson, upon the same firm, for \$2,640.55; so that it would not be due until the 11th October, 1913.

These drafts had been discounted with the defendant bank on or about the respective dates. They were charged against Maybee & Wilson in their current account on the 26th September.

I think I must find that this was with the privity and assent of Maybee & Wilson. It appears that the defendant bank suspected, though the suspicion may have been without foundation, that these drafts were not in truth *bonâ fide* trade documents, and that they did not represent any real transaction. How this may be as a matter of fact I cannot now say, as an action is pending against Porter Brothers in which liability upon the drafts seems to be admitted, but only in part.

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The position of the four cheques held by the Dominion Bank and the Bank of Toronto is as follows. Three of them were issued on the 30th September; the fourth, that for \$555.11, was issued on the 24th September. These four cheques reached the Standard Bank through the Clearing House on the 1st October, and were held until the 3rd October, when they were returned, as dishonoured, to the Dominion Bank and the Bank of Toronto respectively. Afterwards, and while the plaintiff's cheques were in the hands of the Standard Bank, instead of marking the plaintiff's cheques, the Standard Bank recalled these cheques from the Dominion Bank and the Bank of Toronto, and paid them.

I have no doubt that this was done with the intention of nursing the account of Maybee & Wilson. The Dominion Bank and Bank of Toronto cheques had been held as long as it was thought they could safely be held, and then had been returned dishonoured. By recalling and marking them, the failure of Maybee & Wilson would be postponed; for the intention was to hold the plaintiff's cheques as long as possible before returning them dishonoured. This was a matter of importance to the defendant bank, for the "Boucher" item had been charged on the 3rd October, but the cheque was not obtained till the 4th. The Boucher cheque was given to the defendant bank to take up a note made by Boucher, which had been discounted by the bank, and which was not due till November.

Though this item was charged in the bank ledger to Messrs. Maybee & Wilson as the first item on the 3rd October, this was at the time without any authority from them; the cheque for the amount being drawn on the 4th, at the same time as the cheque for \$394.22, which closed the account, and after the Bank of Toronto and Dominion Bank cheques had been paid, and the plaintiff's cheques had been returned.

The cheque itself is marked paid on the 4th (not the 3rd), and it bears date the 4th, and is shewn in the correct order in the bank pass-book.

The cheques paid to the Dominion Bank and the Bank of Toronto and the Boucher item exceed the amount of the five cheques upon which the plaintiff's claim is based.

If the plaintiff's claim was based upon the mere fact that there were funds in the hands of the defendant bank available for pay-

ment of those cheques, the plaintiff would fail: *Hopkinson v. Forster* (1874), L.R. 19 Eq. 74.

But here I think the situation is entirely different. The effect of the transaction in the Clearing House was, that the cheques drawn upon the plaintiff bank and held by the defendant bank were treated as cash items, and brought into an account with cheques drawn upon the defendant bank and held by the plaintiff bank, the balance being paid in cash. Each bank then became the holder of the cheques drawn upon it, paying for them either in cash or by the cheques which were treated as the equivalent of cash. This payment was intended to be an absolute payment if there were funds to meet the cheques; but it was conditional upon this; and, if there were not in fact funds to answer the cheques, the defendant bank was then entitled to return the cheques and to demand recoupment in cash. What was done here was to return the cheques with the statement that there were no funds to answer them, and so to obtain from the plaintiff a refund, evidenced by a Clearing House cheque, which was the equivalent of so much money.

So far as the Boucher cheque is concerned, the statement was not justified, for at that time the defendant bank had no authority whatever to charge this amount to the customer's account. So far as the Bank of Toronto and Dominion Bank cheques were concerned, these cheques had already been returned dishonoured, and the defendant bank had no right to recall them and certify them to the prejudice of the plaintiff's cheques then in their hands.

The obligation of the defendant bank towards the plaintiff is not that of a bank toward the payee of a cheque drawn by its customer. When it, by virtue of the Clearing House transaction, had itself become the holder of the cheque, its obligation was to mark the cheque good if there were funds available or funds which would have been available to meet the payment but for its own wrongful act. So long as it had or ought to have had funds to answer the cheque, it had no right to demand recoupment from the depositing bank; and the recoupment was obtained by that which was in truth a misrepresentation of the real state of affairs.

The case is of importance as indicating the possibilities of a situation that must frequently arise, and it is open to question

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whether legislation is not needed to remedy the evil. When a customer draws a cheque upon his bank, and there are funds to answer it when presented, why should the bank be at liberty to refuse to honour it, retaining the money to meet some demand of its own which has not yet matured, or to pay some other cheque drawn by the customer?

Or again, when cheques come in through the Clearing House, in one bundle, which in the aggregate exceed the amount of the customer's credit, why should the bank be at liberty to determine which should be paid and which should be rejected?

If the contention of the defendant bank in this action is right, a bank, on learning that its customer is in trouble, may refuse to pay any cheques, retaining the balance to the customer's credit to meet all liabilities, direct or indirect, which may thereafter accrue due to it by the customer.

No case is made here on which the plaintiff can recover in respect of the costs in the other unsuccessful litigation.

Judgment will therefore be for the plaintiff for the balance remaining due upon the five cheques, with interest and costs.

## APPENDIX

Cases reported in the Ontario Law Reports and in the Ontario Weekly Notes decided on appeal to the Supreme Court of Canada and reported in the Supreme Court Reports\* since the publication of volume 33 of the Ontario Law Reports:—

CAMPBELL v. IRWIN, 32 O.L.R. 48, reversed by the Supreme Court of Canada: IRWIN v. CAMPBELL, 51 S.C.R. 358.

COFFIN v. GILLIES, 7 O.W.N. 354, affirmed by the Supreme Court of Canada: COFFIN v. GILLIES, 51 S.C.R. 539.

GREER v. CANADIAN PACIFIC R.W. Co., 32 O.L.R. 104, affirmed by the Supreme Court of Canada: GREER v. CANADIAN PACIFIC R.W. Co., 51 S.C.R. 338.

RAYNOR v. TORONTO POWER Co., 32 O.L.R. 612, reversed by the Supreme Court of Canada: TORONTO POWER Co. v. RAYNOR, 51 S.C.R. 490.

UNION BANK OF CANADA v. A. McKILLOP & SONS LIMITED, 30 O.L.R. 87, affirmed by the Supreme Court of Canada: UNION BANK OF CANADA v. A. McKILLOP & SONS LIMITED, 51 S.C.R. 518.

VANSICKLER v. McKNIGHT CONSTRUCTION Co., 31 O.L.R. 531, affirmed by the Supreme Court of Canada: McKNIGHT CONSTRUCTION Co. v. VANSICKLER, 51 S.C.R. 374.

VIVIAN (H. H.) Co. LIMITED v. CLERGUE, 32 O.L.R. 200, affirmed by the Supreme Court of Canada: H. H. VIVIAN AND Co. v. CLERGUE, 51 S.C.R. 527.

WEIR v. HAMILTON STREET R.W. Co., 32 O.L.R. 578, reversed by the Supreme Court of Canada: HAMILTON STREET R.W. Co. v. WEIR, 51 S.C.R. 506.

\*No Ontario cases before the Judicial Committee of the Privy Council have been reported during this period.



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1. *Action by Administrator under Fatal Accidents Act—Benefit*

*of Alien Enemies—Summary Dismissal.*—An action under the Fatal Accidents Act, R.S.O. 1914, ch. 151, brought by the administrator (duly appointed by the proper Surrogate Court) of the estate of a deceased person, cannot be maintained if brought for the benefit of alien enemies of the King.—*Continental Tyre and Rubber Co. (Great Britain) Limited v. Daimler Co. Limited*, [1915] 1 K.B. 893, considered and distinguished. — Such an action, launched after the commencement of the war, was dismissed, upon the summary application of the defendants, with costs.—*Dumenko v. Swift Canadian Co. Limited* (1914), 32 O.L.R. 87, applied and followed. *Dangler v. Hollinger Gold Mines Limited*, 78.

2. *Action for Tort Begun before War—Motion to Dismiss after Hostilities Commenced—Plaintiff Resident in Enemy Country—Security for Costs—Stay of Proceedings until after Restoration of Peace—Judicature Act, sec. 16 (f)—Practice—Order not Necessary while Plaintiff Quiescent.*—The plaintiff, a subject of the Emperor of Austro-Hungary, and resident in Galicia, began this action—in tort, under the Fatal Accidents Act—in 1913, and paid money into Court as security for costs. The action was pending and undisposed of when war was declared in August, 1914:—*Held*, that the action should not be dis-

missed, but merely stayed (Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (f)) until after the restoration of peace; and it was not necessary to issue an order staying proceedings so long as the plaintiff remained quiescent.—Review of the authorities. *Dumenko v. Swift Canadian Co. Limited* (1914), 32 O.L.R. 87, considered and distinguished. *Porter v. Freudenberg*, [1915] 1 K.B. 857, followed. *Luczycki v. Spanish River Pulp and Paper Mills Co.*, 549.

3. *Naturalisation* — R.S.C. 1906, ch. 77, sec. 19.—An alien enemy is not within the provisions of the Naturalisation Act, R.S.C. 1906, ch. 77.—Applications under that Act for the naturalisation in Canada of thirteen aliens were refused by the Judge presiding at an assizes, the applicants appearing to be Turkish subjects, and so alien enemies, and nothing to the contrary being shewn; and this upon the Judge's own initiative, no opposition being filed and no objection offered: sec. 19 of the Act.—*The King v. Lynch*, [1903] 1 K.B. 444, and *Porter v. Freudenberg*, [1915] 1 K.B. 857, followed. *In re Herzfeld* (1914), Q.R. 46 S.C. 281, not followed. *Re Cimonian*, 129.

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#### APPEAL.

1. *To Appellate Division — Finding of Fact of Trial Judge — Credibility of Witnesses — Contract — Enforcement — Consideration — Variation of Judgment at Trial.*—The judgment of BOYD, C., 34 O.L.R. 93, finding an agreement between the parties, was affirmed; MEREDITH, C.J.O., and MAGEE, J.A., dissenting.—It was held by the majority, that the Court was bound by the Chancellor's conclusion upon the question of the credibility of the witnesses; that there was consideration for the defendant's agreement; and that the Statute of Frauds was not a defence to the action; but (in this respect varying the judgment of the Chancellor) that the defendant's agreement was, that on a resale he would pay the plaintiffs the excess over what the property cost him and his expenses, to the extent of the balance remaining due to the plaintiffs on their claim—not the whole surplus.—MEREDITH, C.J.O., and MAGEE, J.A., while recognising the importance to be attached to a finding of fact upon conflicting testimony by a trial Judge who has seen and heard the witnesses, and the reluctance that there always properly is in an appellate Court to reverse such a finding, were of opinion that the circumstances of this case were such that they were compelled to the conclusion that the finding was not

warranted and should be set aside. *Leslie v. Stevenson*, 473.

2. *To Privy Council—Right of Appeal—Amount in Controversy—Assessment and Taxes—Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 2—Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48 (6).*—The company proposed to appeal to the Privy Council from the decision of a Divisional Court upon an appeal from a decision of the Ontario Railway and Municipal Board in regard to the assessment of the company's lands and business in the town for the year 1914. The decision of the Divisional Court was that the actual value of the lands assessed should be fixed at \$100,000 and their business assessment at \$210,000. — *Held*, that the matter in controversy, for the purposes of an appeal from the decision of the Divisional Court, was not shewn to exceed \$4,000 (Privy Council Appeals Act, R.S.O. 1914, ch. 54, sec. 2, and Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 48 (6) ); and, therefore, the proposed appeal did not lie as of right; and a motion for approval of the security lodged for the purpose of an appeal was refused.—*Quære*, whether any questions but questions of fact were involved, and whether an appeal on a question of assessment was intended to be allowed. *Re Ontario and Minnesota Power Co. and Town of Fort Frances*, 365.

3. *To Privy Council—Right of Appeal—Order of Appellate Divi-*

*sion Affirming Order of Ontario Railway and Municipal Board—Operation of Railway on Highway—Agreement between Railway Company and Municipal Corporation—Privy Council Appeals Act, secs. 2, 3—Ontario Railway and Municipal Board Act, sec. 48 (6).*—It was held, that, under sec. 48 (6) of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, an appeal lay to the Privy Council from an order of a Divisional Court dismissing an appeal from an order of the Ontario Railway and Municipal Board allowing a railway company to operate its railway on a certain highway in pursuance of an agreement between the company and a municipal corporation; and an order was made approving the security upon a proposed appeal and allowing the appeal.—The statutory provision referred to expressly covers the case, and sec. 3 of the Privy Council Appeals Act, R.S.O. 1914, ch. 54, applies to the appeal as fully as if it were brought under sec. 2 of that Act. *Re Toronto R.W. Co. and City of Toronto*, 465.

4. *To Supreme Court of Canada—Time for Giving Security—Extension—"Special Circumstances"—Supreme Court Act, R.S.C. 1906, ch. 139, secs. 69, 71.*—The plaintiffs, desiring to appeal to the Supreme Court of Canada from a judgment of the Appellate Division, gave notice to the defendants, within the 60 days allowed by sec. 69 of the Supreme Court Act, R.S.C. 1906, ch. 139, of their intention to appeal, but

did not give the requisite security until 13 days after the expiry of the time. The delay was caused partly by the illness of one of the plaintiffs, and partly by a misapprehension as to the time allowed; but it was shewn that the plaintiffs had, within the 60 days, given definite instructions to proceed with the appeal; and the amount in dispute was large enough to permit of an appeal to the Privy Council:—*Held*, that “special circumstances” existed which justified an extension of the time under sec. 71 of the Act; and an order was made approving of the security and allowing the appeal—the plaintiffs paying the defendants’ costs of the application and agreeing to expedite the appeal. *Reaume v. City of Windsor*, 384.

See COSTS—DIVISION COURTS, 1 — EVIDENCE, 1 — LIBEL — MECHANICS’ LIENS, 3, 4—MUNICIPAL CORPORATIONS, 4, 5 — PRACTICE — RECEIVER, 2 — WATER, 2.

### APPEARANCE.

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### ARBITRATION AND AWARD.

*Motion to Set aside Award — Claim under Municipal Drainage Act, R.S.O. 1914, ch. 198, sec. 80 — Notice — Damages — Mistake in Law of Arbitrator — Written Reasons Accompanying Award — Error on Face of Award — Jurisdiction to Set aside.*]—It is the duty of the Court to set aside an award where an error in law ap-

pears on the face of the award; and, where the arbitrator gives his reasons in a memorandum accompanying the award, error in law may be shewn by reference to these reasons.—Review of the authorities. *Kent v. Elstob* (1802), 3 East 18, approved and followed.—The plaintiff complained of injury to his land by reason of drains constructed by the defendants, and commenced proceedings under the Municipal Drainage Act, R.S.O. 1914, ch. 198, by a notice in which claims were made for original malconstruction of the drains and also for negligent upkeep or “nonrepair.” Section 80 (2) of the Act provides that the municipality shall not be liable for nonrepair unless and until the service of notice. The parties submitted their differences, based upon these claims, to arbitration, and the arbitrator made an award that the plaintiff was entitled only to such damages as he sustained after service of the notice, and that after the date of service he sustained no damages whatever:—*Held*, that there was error in law upon the face of the award: the plaintiff had a right to complain of original malconstruction; and the damages, if any, accruing to him before the service of the notice under sec. 80, must be determined and not passed over as not allowed by the law; and the award should be set aside. *Parsons v. Township of Eastnor*, 110.

See MUNICIPAL CORPORATIONS, 5—RAILWAY, 2, 3, 4.

**ARREST.**

*Fraudulent Debtors Arrest Act, R.S.O. 1914, ch. 83, sec. 3 (1) — Proof of Debt and Intent to Quit Ontario and Intent to Defraud—Evidence—Questions of Fact—Intent to Leave without Providing for Debts—Effect of—Arrest of Defendant and Subsequent Discharge.*—An order for the arrest of a defendant for debt, under the Fraudulent Debtors Arrest Act, R.S.O. 1914, ch. 83, ought not to issue until the plaintiff has fully proved: (1) an indebtedness to him by the defendant of not less than \$100; (2) that the defendant is about to quit Ontario; (3) with intent to defraud his creditors generally or to defraud the plaintiff only (sec. 3 (1) of the Act); and whether or not these three things are proved is as to each a question of fact.—The fact that the quitting is about to take place without any provision being made for the payment of debts may, in certain circumstances, be evidence of a fraudulent intent; but it is not always nor necessarily so. The Act does not provide for the arrest of persons about to quit Ontario without paying their debts; and it is not to be treated as if it did.—*Toothe v. Frederick* (1891), 14 P.R. 287, and *Coffey v. Scane* (1894-5), 25 O.R. 22, 22 A.R. 269, considered and reconciled.—Upon the facts stated by the plaintiffs on affidavits, an *ex parte* application for an order for the arrest of the defendant was granted; the defendant was arrested; but was afterwards discharged from custody, upon his

own application, shewing a different state of facts. *Simpson v. Genser*, 381.

**ASSESSMENT AND TAXES.**

1. *Annexation of Part of Township to Village—Orders of Ontario Railway and Municipal Board—Erection of Village, including Annexed Territory, into Town—Assessment of Lands in Annexed Territory — Assessment not Applicable to Current Year—Injunction against Collection of Taxes—Taxation without Representation—Validity.*—To entitle a municipality to demand taxes, a legal and proper assessment must (speaking generally) be made out.—*Held*, reversing, upon one branch of the case, the judgment of *Boyd, C.*, that there was no legal assessment of the plaintiff's land—the only assessment made being such as could not be made use of until the following year—and the defendants should be restrained from collecting the taxes alleged to be payable.—In other respects the judgment was affirmed.—*Per RIDDELL, J.*—The statute does not make the liability to pay taxes depend on the capacity to vote. It may be that taxation without representation is unconstitutional; but that means only that it is opposed to the principles, more or less vaguely and generally stated, upon which the people should be governed; to say that something is unconstitutional does not indicate anything as to its legality. *Bell v. Town of Burlington*, 410, 619.

2. *Exemption—Orphan Asylum—Assessment Act, R.S.O. 1914,*



ch. 195, sec. 5 (9).]—An orphan asylum and the land connected with it are exempt from taxation under sec. 5, sub-sec. 9, of the Assessment Act, R.S.O. 1914, ch. 195, notwithstanding that the orphans admitted are restricted to a certain class. The words "orphan asylum" in the sub-section do not mean a "public orphan asylum" only, nor a "charitable institution" within the meaning of such cases as *City of Bangor v. Rising Virtue Masonic Lodge* (1882), 73 Me. 428, and *Re Linen and Woollen Drapers Institution* (1887), 58 L.T.R. 953.—*Struthers v. Town of Sudbury* (1900), 27 A.R. 217, applied and followed. *Re Independent Order of Foresters and Town of Oakville*, 524.

3. *Railway Bridge Spanning Navigable River—Ownership of Soil of Bed of River in Crown—Statutory Authority for Erection of Bridge—Grant of Soil—"Structure on Railway Lands"—Exemption from Assessment*—Assessment Act, R.S.O. 1914, ch. 195, sec. 47, sub-sec. 3.]—That part of the New York and Ottawa Railway Company's bridge over the river St. Lawrence which is within the township of Cornwall was held to be a "structure on railway lands" within the meaning of sub-sec. 3 of sec. 47 of the Assessment Act, R.S.O. 1914, ch. 195, and therefore not assessable by the township municipality.—The erection and maintenance of the bridge having been authorised by Act of the Parliament of Canada, and the Crown being the owner of the soil and free-

hold of the bed of the river and of the islands therein—the ownership extending *usque ad cælum*—a grant of the right to construct and maintain the bridge was a grant of the part of the soil occupied by it; and, therefore, the railway company was the owner of so much of the soil as was occupied by the superstructure as well as by the piers; and so the bridge was a "structure on railway lands." *Re Ottawa and New York R.W. Co. and Township of Cornwall*, 55.

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### ATTEMPT TO COMMIT TREASON.

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### BANKS AND BANKING.

1. *Obligation of Bank on which Cheques Drawn by Customer to Bank Holding Cheques—Effect of Clearing House Transaction—Costs of Former Litigation.*]—A customer of the defendant bank drew certain cheques upon it, which were endorsed by the payees to the plaintiff bank; the cheques went through the Toronto Clearing House in the ordinary way; and, upon presentation to the defendant bank, were dishonoured. The plaintiff bank, being admittedly the lawful holder of the cheques, sued the defendant bank to recover the aggregate amount of the cheques, less payments made thereon, and was held, entitled to recover,

upon the ground that there was money standing to the credit of the drawer of the cheques at the time they were presented, or that there would have been such money but for the improper acts of the defendant bank; and that it was, therefore, the duty of the defendant bank, which had received the cheques through the Clearing House, to have marked them good and to have treated them as paid.—The effect of the transaction in the Clearing House explained. — *Quære*, whether, when a customer draws a cheque upon his bank, and there are funds to answer it when presented, the bank should be at liberty to refuse to honour it, retaining the money to meet some demand of its own which has not yet matured, or to pay some other cheque drawn by the customer; or whether, when cheques come in through the Clearing House, in one bundle, which in the aggregate exceed the amount of the customer's credit, the bank should be at liberty to determine which should be paid and which rejected.—*Held*, that the plaintiff bank was not entitled to recover from the defendant bank the costs incurred in unsuccessful actions brought against the endorers of the cheques. *Bank of British North America v. Standard Bank of Canada*, 648.

2. *Winding-up of Bank — Contributories—Right to Discovery—Examination of Bank Manager—Winding-up Act, R.S.C. 1906, ch. 144, sec. 117—Scope of—Liquidator.*—Section 117 of the Wind-

ing-up Act, R.S.C. 1906, ch. 144, confers a special power, of inquisitorial character, intended to be used by the liquidator, acting under a winding-up order, for his own guidance in the conduct of the liquidation. But, in certain circumstances, there may be some right of discovery open to a person charged in the winding-up as a contributory. In this case it was directed, upon an appeal, that an Official Referee, before whom the reference under an order for the winding-up of a bank was pending, should consider the application of five persons whose names were placed by the liquidator upon the list of contributories, for leave to examine for discovery the former general manager of the bank, in the view that the applicants might have a claim to invoke the aid of sec. 117.—*Whitworth's Case* (1881), 19 Ch. D. 118, 120, and *Re Penysflog Mining Co.* (1874), 30 L.T.R. 861, applied. *Re Sovereign Bank of Canada, Newman's Case*, 577.

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*Besterman v. British Motor Cab Co.*, [1914] 3 K.B. 181, followed.]—See RAILWAY, 5.

*Brennen (M.) & Sons Manufacturing Co. Limited v. Thompson* (1915), 33 O.L.R. 465, followed.]—See PRACTICE.

*Brinsmead (Thomas Edward) & Sons, In re*, [1897] 1 Ch. 45, followed.]—See COMPANY, 3.

*Brooks-Sanford Co. v. Theodore Telier Construction Co.* (1910), 22 O.L.R. 176, considered and distinguished.]—See MECHANICS' LIENS, 4.

*Bunting v. Bell* (1876), 23 Gr. 584, overruled.]—See MECHANICS' LIENS, 4.

*Caldwell v. McLaren* (1884), 9 App. Cas. 392, 406, referred to.]—See WATER, 1.

*Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489, followed.]—See PRINCIPAL AND AGENT.

*Caswell v. St. Mary's and Proof Line Junction Road Co.* (1869), 28 U.C.R. 247, 254, applied and followed.]—See HIGHWAY.

- Cavanagh and Canada Atlantic R.W. Co., In re* (1907), 14 O.L.R. 523, 6 Can. Ry. Cas. 395, approved and applied.]—See RAILWAY, 3.
- Clements, In re* (1877), 46 L.J.Ch. 375, 383, followed.]—See CONTEMPT OF COURT.
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- Ellis and Town of Renfrew, Re* (1910-11), 21 O.L.R. 74, 23 O.L.R. 427, followed.]—See MUNICIPAL CORPORATIONS, 7.
- Elliston v. Reacher*, [1908] 2 Ch. 374, 384, referred to.]—See DIVISION COURTS, 1.
- Essery v. Bell* (1909), 18 O.L.R. 76, considered.]—See COVENANT.
- "Finance Union," In re* (1895), 11 Times L.R. 167, 169, followed.]—See CONTEMPT OF COURT.
- Finlay v. Bristol and Exeter R.W. Co.* (1852), 7 Ex. 409, considered and distinguished.]—See LANDLORD AND TENANT, 2.
- Fonseca v. Jones* (1909), 19 Man. R. 334, disapproved.]—See DISCOVERY.
- Ford, Ex p.* (1885), 16 Q.B.D. 305, applied and followed.]—See LANDLORD AND TENANT, 1.

*Foster v. Mackinnon* (1869), L.R. 4 C.P. 704, followed.]—See PRINCIPAL AND AGENT.

*Garland Manufacturing Co. v. Northumberland Paper and Electric Co. Limited* (1899), 31 O.R. 40, considered and distinguished.]—See LANDLORD AND TENANT, 2.

*Gibbs v. Rumsey* (1813), 2 V. & B. 294, considered and applied.]—See WILL, 3.

*Gibson v. Holland* (1865), L.R. 1 C.P. 1, followed.]—See CONTRACT, 3.

*Gluckstein v. Barnes*, [1900] A.C. 240, distinguished.]—See PARTNERSHIP, 2.

*Godfrey, In the Goods of* (1893) 69 L.T.R. 22, applied and followed.]—See WILL, 1.

*Gordon v. City of Belleville* (1887), 15 O.R. 26, 28, 30, applied and followed.]—See HIGHWAY.

*Gosfield South v. Mersea* (1895), 1 Clarke & Scully's Drainage Cases 268, approved.]—See MUNICIPAL CORPORATIONS, 4.

*Hagel v. Dalrymple, In re* (1879), 8 P.R. 183, approved and followed.]—See DIVISION COURTS, 2.

*Hair v. Town of Meaford* (1914), 31 O.L.R. 124, referred to.]—See MUNICIPAL CORPORATIONS, 9.

*Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488, 491, followed.]—See PARTNERSHIP, 1—LANDLORD AND TENANT, 1.

*Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778, specially referred to.]—See STATUTE OF FRAUDS.

*Haven Gold Mining Co., In re* (1882), 20 Ch. D. 151, followed.]—See COMPANY, 3.

*Helmores v. Smith* (1886), 35 Ch. D. 449, 455, followed.]—See CONTEMPT OF COURT.

*Herzfeld, In re* (1914), Q.R. 46 S.C. 281, not followed.]—See ALIEN ENEMY, 3.

*Hibben v. Collister* (1900), 30 S.C.R. 459, followed.]—See PARTNERSHIP, 1.

*Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, followed.]—See NEGLIGENCE.

*Holme v. Brunskill* (1877), 3 Q.B.D. 495, distinguished.]—See GUARANTY, 2.

*Huntley, Township of, and Township of March, Re* (1909), 1 O.W.N. 190, 14 O.W.R. 1033, distinguished.]—See MUNICIPAL CORPORATIONS, 4.

*Innes v. Munro* (1847), 1 Ex. 473, applied and followed.]—See PROMISSORY NOTE.

*James v. Ontario and Quebec R.W. Co.* (1886-8), 12 O.R. 624, 15 A.R. 1, followed.]—See RAILWAY, 3.

*Jameson v. Lang* (1878), 17 P.R. 404, followed.]—See LIS PENDENS.

*Jordeson v. Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, followed.]—See LAND.

*Kent v. Elstob* (1802), 3 East 18, approved and followed.]—See ARBITRATION AND AWARD.

*Lamb v. Evans*, [1893] 1 Ch. 218, applied and followed.]—See LANDLORD AND TENANT, 1.

*Larkin v. Larkin* (1900), 32 O.R. 80, dictum of MACMAHON, J., at p. 98, approved.]—See MECHANICS' LIENS, 4.

*Leslie v. Stevenson* (1915), 34 O.L.R. 93, varied.]—See APPEAL, 1.

*Lewis v. Clay* (1897), 67

L.J.Q.B. 224, followed.] — See PRINCIPAL AND AGENT.

*Linen and Woollen Drapers Institution, Re* (1887), 58 L.T.R. 953, distinguished.]—See ASSESSMENT AND TAXES, 2.

*London County Council v. Allen*, [1914] 3 K.B. 642, followed.]—See COVENANT.

*McArthur v. Dominion Cart-ridge Co.*, [1905] A.C. 72, explained and distinguished.]—See SALE OF GOODS, 3.

*McCracken and United Townships of Sherborne et al., Re* (1911), 23 O.L.R. 81, distinguished.]—See MUNICIPAL CORPORATIONS, 2.

*McDonald v. Lancaster Separate School Trustees* (1914), 31 O.L.R. 360, affirmed.] — See SCHOOLS.

*Mackell v. Ottawa Separate School Trustees* (1914), 32 O.L.R. 245, affirmed.]—See CONSTITUTIONAL LAW, 2. Followed.]—See CONSTITUTIONAL LAW, 3.

*McNiven v. Pigott* (1914-5), 33 O.L.R. 78, 335, followed.]—See TRUSTS AND TRUSTEES.

*Macpherson and City of Toronto, Re* (1895), 26 O.R. 558, distinguished.]—See MUNICIPAL CORPORATIONS, 5. Approved and applied.]—See RAILWAY, 3.

*Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, followed.]—See NEGLIGENCE.

*Molony v. Kernan* (1842), 2 Dr. & War. 31, followed.] — See TRUSTS AND TRUSTEES.

*Moorcock, The* (1889), 14 P.D. 64, specially referred to.] — See GUARANTY, 1.

*Moore v. Boyd* (1881), 8 P.R. 413, approved.]—See DISCOVERY.

*Morton, In the Goods of* (1887), 12 P.D. 141, applied and followed.]—See WILL, 1.

*Nisbet & Potts' Contract, In re*, [1905] 1 Ch. 391, [1906] 1 Ch. 386, followed.]—See COVENANT.

*Oakes v. Turquand* (1867), L.R. 2 H.L. 325, followed.]—See COMPANY, 1.

*Oland v. McNeil* (1902), 32 S.C.R. 23, distinguished.] — See TRUSTS AND TRUSTEES.

*Ontario Asphalt Block Co. v. Montreuil* (1913), 29 O.L.R. 534, specially referred to.]—See VENDOR AND PURCHASER.

*Orford, Township of, and Township of Aldborough, Re* (1912), 27 O.L.R. 107, distinguished.]—See MUNICIPAL CORPORATIONS, 4.

*Orr v. Robertson* (1915), 34 O.L.R. 147, distinguished.]—See MECHANICS' LIENS, 6.

*Page v. Morgan* (1885), 15 Q.B.D. 228, followed.]—See SALE OF GOODS, 1.

*Paladino v. Gustin* (1897), 17 P.R. 553, referred to.] — See LIBEL.

*Pastoral Finance Association Limited v. The Minister*, [1914] A.C. 1083, applied.]—See RAILWAY, 2.

*Pattullo and Town of Orangeville, In re* (1899), 31 O.R. 192, distinguished.]—See RAILWAY, 4.

*Pearson v. Benson* (1860), 28 Beav. 598, followed.] — See TRUSTS AND TRUSTEES.

*Penysflog Mining Co., Re* (1874), 30 L.T.R. 861, applied.] — See BANKS AND BANKING, 2.

*Phillips and Canadian Order of Chosen Friends, Re* (1906), 12 O.L.R. 48, followed.]—See INSURANCE, 1.

*Pierson v. Crooks* (1889), 115 N.Y. 539, specially referred to.]—See SALE OF GOODS, 1.

*Porter v. Freudenberg*, [1915] 1 K.B. 857, followed.]—See ALIEN ENEMY, 2, 3.

*Poucher v. Wilkins* (1915), 33 O.L.R. 125, distinguished.]—See EXECUTION.

*Poulter v. Killingbeck* (1799), 1 B. & P. 397, followed.]—See CONTRACT, 2.

*Pounsett v. Fuller* (1856), 17 C.B. 660, specially referred to.]—See VENDOR AND PURCHASER.

*Provincial Fisheries, In re* (1896), 26 S.C.R. 444, referred to.]—See WATER, 2.

*Railway Timetables Publishing Co., In re* (1889), 42 Ch. D. 98, followed.]—See COMPANY, 1.

*Regina v. Cox*, [1898] 1 Q.B. 179, followed.]—See CRIMINAL LAW, 3.

*Regina v. Crossen* (1899), 3 Can. Crim. Cas. 152, not followed.]—See CRIMINAL LAW, 5.

*Regina v. Taylor* (1859), 1 F. & F. 511, followed.]—See CRIMINAL LAW, 8.

*Rex v. Borror* (1915), 9 O.W.N. 64, distinguished.]—See MUNICIPAL CORPORATIONS, 6.

*Rex v. Carmichael* (1902), 7 Can. Crim. Cas. 167, not followed.]—See CRIMINAL LAW, 5.

*Rex v. Langlois* (1914), 23 Can. Crim. Cas. 43, not followed.]—See CRIMINAL LAW, 4.

*Rex v. Linneker*, [1906] 2 K.B. 99, followed.]—See CRIMINAL LAW, 8.

*Rex v. Lynch*, [1903] 1 K.B. 444, followed.]—See ALIEN ENEMY, 3.

*Rex v. Nelson* (1901), 4 Can.

Crim. Cas. 461, approved.]—See CRIMINAL LAW, 5.

*Rex v. St. Pierre* (1902), 4 O.L.R. 76, distinguished.]—See MUNICIPAL CORPORATIONS, 6.

*Rex v. Stubbs* (1915), 31 W.L.R. 567, not followed.]—See CRIMINAL LAW, 4.

*Rex v. Toronto R.W. Co.* (1911), 23 O.L.R. 186, approved.]—See CRIMINAL LAW, 1.

*Roe dem. Brune v. Prideaux* (1808), 10 East 158, referred to.]—See LANDLORD AND TENANT, 2.

*Ryan and Town of Alliston, Re* (1910), 21 O.L.R. 582, 22 O.L.R. 200, applied.]—See MUNICIPAL CORPORATIONS, 7.

*Schumacher and Town of Chesley, Re* (1910), 21 O.L.R. 522, followed.]—See MUNICIPAL CORPORATIONS, 7.

*Sheppard v. Kennedy* (1884), 10 P.R. 242, followed.]—See LIS PENDENS.

*Sherlock v. Powell* (1899), 26 A.R. 407, distinguished and head-note corrected.]—See MECHANICS' LIENS, 2.

*Sinclair and Town of Owen Sound, Re* (1906), 13 O.L.R. 447, applied.]—See MUNICIPAL CORPORATIONS, 7.

*Skipworth's Case* (1873), L.R. 9 Q.B. 219, 230, 235, followed.]—See CONTEMPT OF COURT.

*Small v. Thompson* (1897), 28 S.C.R. 219, explained and distinguished.]—See MORTGAGE.

*Smith v. Traders Bank* (1905), 11 O.L.R. 24, followed.]—See PRACTICE.

*Soper v. City of Windsor* (1914), 32 O.L.R. 352, followed.]—See COVENANT.

*Sornberger v. Canadian Pacific*

*R.W. Co.* (1897), 24 A.R. 263, referred to.]—See TRIAL.

*Stewart v. McKean* (1855), 10 Ex. 675, applied and followed.]—See GUARANTY, 2.

*Stewart v. Young* (1894), 38 Sol. J. 385, applied and followed.]—See GUARANTY, 2.

*Struthers v. Town of Sudbury* (1900), 27 A.R. 217, applied and followed.]—See ASSESSMENT AND TAXES, 2.

*Stuart v. Mott* (1894), 23 S.C.R. 153, 384, 388, followed.]—See CONTRACT, 2.

*Taylor v. Smith*, [1893] 2 Q.B. 65, followed.]—See SALE OF GOODS, 1.

*Terry v. Duntze* (1795), 2 H.Bl. 389, applied.]—See MECHANICS' LIENS, 2.

*Thompson v. Hill* (1870), L.R. 5 C.P. 564, applied.]—See WATER, 4.

*Thomson v. Dymont* (1886), 13 S.C.R. 303, distinguished.]—See SALE OF GOODS, 1.

*Till v. Town of Oakville* (1915), 33 O.L.R. 120, followed.]—See RAILWAY, 5.

*Tomlinson v. Hill* (1855), 5 Gr. 231, followed.]—See COVENANT.

*Tooth v. Frederick* (1891), 14 P.R. 287, considered.]—See ARREST.

*Toronto, City of, v. Toronto R.W. Co.* (1905), 5 O.W.R. 130, followed.]—See STREET RAILWAY.

*Toronto General Trusts Corporation v. Gordon Mackay & Co. Limited* (1915), 33 O.L.R. 183, reversed.]—See CONTRACT, 1.

*Toronto R.W. Co. v. Toronto Corporation*, [1906] A.C. 117, followed.]—See STREET RAILWAY.

*Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594, followed.]—See LAND.

*Trowbridge v. Wetherbee* (1865), 93 Mass. (11 Allen) 361, followed.]—See CONTRACT, 2.

*Vic Mill Limited, In re*, [1913] 1 Ch. 183, followed.]—See CONTRACT, 3—SALE OF GOODS, 2.

*Walker v. Dickson* (1892), 20 A.R. 96, followed.]—See MORTGAGE.

*Webster v. Petre* (1879), 4 Ex. D. 127, applied and followed.]—See GUARANTY, 2.

*Wedderburn v. Wedderburn* (1855), 22 Beav. 84, followed.]—See PARTNERSHIP, 1.

*Wenham, In re*, [1892] 3 Ch. 59, applied.]—See EXECUTORS AND ADMINISTRATORS, 1.

*Whitworth's Case* (1881), 19 Ch. D. 118, 120, applied.]—See BANKS AND BANKING, 2.

*Wilks v. Williams* (1861), 2 J. & H. 125, 128, applied and followed.]—See WILL, 2.

*Wilmont's Case* (1914), 10 Cr. App. R. 173, distinguished.]—See CRIMINAL LAW, 7.

*Winnipeg, City of, v. Barrett*, [1892] A.C. 445, followed.]—See CONSTITUTIONAL LAW, 2.

*Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381, distinguished.]—See WILL, 3.

# CERTIFICATE.

See RECEIVER, 2.

# CHARITABLE INSTITUTION.

See NEGLIGENCE.

# CHEQUES.

See BANKS AND BANKING, 1.



**CHURCH.**

*Conveyance of Land to Trustees for—Appointment of New Trustees—Power to Mortgage—Resolution of Congregation—Religious Institutions Act, R.S.O. 1914, ch. 286, secs. 7, 8, 16, 18 — Trustee Act, R.S.O. 1914, ch. 121.]* — In 1909, land was conveyed to six persons named and described as the trustees of a certain church; they took the land as joint tenants, and not as tenants in common; but the conveyance did not define the trust nor make any provision for the appointment of new trustees. There was no formal appointment of the trustees as such by the congregation of the church. Two of the trustees resigned. In 1915, the congregation, at a special meeting, passed a resolution approving and confirming the appointment of the six original trustees, and providing a mode of appointing successors to trustees in the future:—*Held*, having regard to the provisions of the Religious Institutions Act, R.S.O. 1914, ch. 286, especially secs. 7, 8, 16, and 18, that, all technical requirements of the Act as to notices of meetings etc. having been complied with, the congregation had power to appoint trustees and to determine the manner in which their successors should be appointed; and that, upon this being done, the land, without conveyance, vested in the trustees so appointed, and they had power to mortgage the land for the purposes mentioned in sec. 8.—The Religious Institutions Act governs the appoint-

ment of trustees for religious institutions, and this by implication excludes the corresponding provisions of the general Trustee Act, R.S.O. 1914, ch. 121. *Re Lutheran Church of Hamilton*, 228.

**CLEARING HOUSE.**

*See* BANKS AND BANKING, 1.

**COLLATERAL CONTRACT.**

*See* LANDLORD AND TENANT, 1.

**COMMISSION.**

*See* PRINCIPAL AND AGENT.

**COMMITTAL.**

*See* CONTEMPT OF COURT.

**COMMON GAMING HOUSE.**

*See* CRIMINAL LAW, 4.

**COMMON NUISANCE.**

*See* CRIMINAL LAW, 1.

**COMPANY.**

1. *Subscription for Shares — Non-delivery of Prospectus—Ontario Act respecting Prospectuses Issued by Companies*, 6 Edw. VII. ch. 27, sec. 3 (3)—*Effect of—Contract Voidable not Void—Election to Affirm—Delay in Repudiating—Action for Calls—Implied Repeal of Statute by Companies Act*, 1907.]—The right to avoid subscriptions for company-shares must be exercised promptly on discovering the facts. — *Oakes v. Turquand* (1867), L.R. 2 H.L. 325, followed.—The rule is applicable to subscriptions not obtained by misrepresentation so long as they are merely voidable and not void; and the statutory provision (Ontario statute 6

Edw. VII. ch. 27, sec. 3 (3) ) that no subscription for stock, obtained by verbal representations, shall be binding upon the subscriber, unless he shall, prior to subscribing, have received a copy of the prospectus, has no greater effect than to make the subscriber's contract voidable if the prospectus has not been received—he may elect to approve or disaffirm.—And *held* (HODGINS, J.A., dissenting), that the defendant had elected to affirm his contract, and could not, in an action for calls brought nearly three years after the date of his subscription, succeed upon the defence that he had not received a prospectus.—*Quære*, whether the Act respecting Prospectuses issued by Companies, 6 Edw. VII. ch. 27, was repealed by the Ontario Companies Act, 1907, 7 Edw. VII. ch. 34.—*Per* HODGINS, J.A.:—The effect of sec. 3 (3) of 6 Edw. VII. ch. 27 was to wipe out the subscription or make it legally non-existent; and no act appeared to have been done by the defendant from which his assent to becoming a shareholder could be inferred; where the contract to take shares is void, liability depends upon assent in fact to the name being on the register.—*In re Railway Timetables Publishing Co.* (1889), 42 Ch.D. 98, followed. *Morrisburgh and Ottawa Electric R.W. Co. v. O'Connor*, 161.

2. *Winding-up — Directors — Misfeasance—Winding-up Act, R.S.C. 1906, ch. 144, sec. 123 — Scope of — Procedure — Irregularity in Election of Directors—De*

*Facto Directors — Liability—Payment of Dividends out of Capital—Payment of Bonuses.*—The misfeasance section, 123, of the Winding-up Act, R.S.C. 1906, ch. 144, does not create liability; it relates to procedure only; the liability must be found outside of the section.—The section is wide in its application: it covers the case of a *de facto* director guilty of misfeasance while assuming to direct the affairs of a company, although there may have been irregularity in the proceedings leading to his election as director; it does not lie in his mouth to criticise the method of his appointment.—More than honesty is required of a director; reasonable intelligence and diligent attention to business are also essential.—*De facto* directors were *held* liable, upon a summary application under sec. 123, in the course of the winding-up of the company, for dividends in fact paid out of capital, but not for sums paid to themselves as bonuses upon becoming sureties for advances to the company. *Re Owen Sound Lumber Co.*, 528.

3. *Winding-up — Petition of Shareholders for Order under Dominion Act, R.S.C. 1906, ch. 144—Report of Inspector Appointed under Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 126—Meeting of Shareholders — Vote on Proposal to Wind up—Impairment of Capital — “Just and Equitable” — Evidence — Discretion—Sec. 11 (d), (e), of Dominion Act.]—Held, in the circumstances of this case, that it was the duty of the Court, in the*

proper exercise of its discretion, to make an order for the winding-up of the company, under the Winding-up Act, R.S.C. 1906, ch. 144, sec. 11, clause (d), giving the Court power to do so when the capital is impaired, and clause (e), giving the Court power to do so when of opinion that it is just and equitable that the company should be wound up.—*In re Haven Gold Mining Co.* (1882), 20 Ch.D. 151, and *In re Thomas Edward Brinsmead & Sons*, [1897] 1 Ch. 45, followed. *Re Hamilton Ideal Manufacturing Co. Limited*, 66.

4. *Winding-up of Trading Company—Claim of City Corporation—Business Tax—Preferential Claim on Assets in Hands of Liquidator—Distress—Winding-up Act, R.S.C. 1906, ch. 144, secs. 20, 23, 84.*—The claim of a municipal corporation for taxes upon a business assessment of an incorporated trading company is to be treated by the liquidator of the company under a winding-up order as the ordinary claim of a creditor, and not as a preferential claim upon the assets of the company, the corporation not having distrained, as they might have, before the winding-up order.—*Semble*, that secs. 20, 23, and 84 of the Winding-up Act, R.S.C. 1906, ch. 144, expressly prevent a liquidator from allowing a preference or priority unless impressed upon assets before such assets were taken possession of by him. *Re Faulkner Limited, City of Ottawa's Claim*, 536.

See CONTRACT, 1—LANDLORD

AND TENANT, 2—STATUTE OF FRAUDS.

### COMPENSATION.

See MUNICIPAL CORPORATIONS, 5—RAILWAY, 2, 3, 4—WATER, 3.

### CONDITION.

See SALE OF GOODS, 1.

### CONDITIONAL SALE.

See MECHANICS' LIENS, 3—MORTGAGE.

### CONSENT.

See CRIMINAL LAW, 5.

### CONSENT JUDGMENT.

See MUNICIPAL CORPORATIONS, 9.

### CONSPIRACY.

See CRIMINAL LAW, 2.

### CONSTITUTIONAL LAW.

1. *Marriage Act, R.S.O. 1914, ch. 148, sec. 36—Ultra Vires—British North America Act, 1867, secs. 91 (26), 92 (12)—Jurisdiction of Supreme Court of Ontario—Declaration of Invalidity of Marriage—Declaratory Judgment—Judicature Act, sec. 16 (b)—Prior Known Decision—Reference to Appellate Division—Judicature Act, sec. 32.*—Section 36 of the Marriage Act, R.S.O. 1914, ch. 148, providing that the Supreme Court of Ontario shall have power, in certain circumstances, to declare and adjudge that a valid marriage was not effected or entered into between persons who have gone through a form of marriage, is beyond the powers of the Provincial Legislature. Under the British North America

Act, 1867, "marriage and divorce" are put within the exclusive legislative powers of the Parliament of Canada (sec. 91 (26)), with the exception of "the solemnisation of marriage in the Province," which is placed under the exclusive power of the Legislatures of the Provinces (sec. 92 (12)); and sec. 36 of the Marriage Act does not come within the latter clause. The Supreme Court has no power under sec. 36, nor has it power otherwise, to entertain an action for a declaration that a valid marriage was not entered into between the plaintiff and defendant; and, though the Court has power, under sec. 16 (b) of the Judicature Act, R.S.O. 1914, ch. 56, to pronounce a declaratory judgment, that power is not applicable in such a case.—So *held*, by the Judge before whom such an action came for trial, who considered, however, that he was precluded from giving effect to his opinion by sec. 32 of the Judicature Act, because of a prior known judgment to the opposite effect of a Judge of co-ordinate jurisdiction; and who, therefore, referred the case to the Appellate Division. *Peppiatt v. Peppiatt*, 121.

2. *Roman Catholic Separate Schools—Regulations of Department of Education—Intra Vires—5 Geo. V. ch. 45 (O.)—B.N.A. Act, sec. 93, sub-sec. 1—"Right or Privilege"—"Class of Persons"—"Have by Law"—Use of French Language in Schools—Treaty Rights—Natural Rights—26 Vict. ch. 5—B.N.A. Act, sec. 133—*

*Powers of Provincial Legislature.]—The validity of Regulations 17 (1912 and 1913) of the Department of Education is established by the Ontario Act 5 Geo. V. ch. 45, "An Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," unless the Ontario legislation is itself *ultra vires*.—Only rights or privileges which exist as legal rights or privileges ("have by law") are preserved by sec. 93, sub-sec. 1, of the British North America Act.—*City of Winnipeg v. Barrett*, [1892] A.C. 445, followed.—The right to use the French language in the Separate Schools of the Province of Ontario has not been guaranteed by treaty or otherwise to the French-speaking people, nor is it a natural right pertaining to them which (as argued) the Legislature is powerless to impair or destroy; if the right had been guaranteed by treaty, the new constitution for Canada which was provided by the British North America Act would have abrogated the right, except in so far, if at all, as granted by it.—Judgment of LENNOX, J., 32 O.L.R. 245, affirmed. *Mackell v. Ottawa Separate School Trustees*, 335.*

3. *Roman Catholic Separate Schools—5 Geo. V. ch. 45 (O.)—Suspension of Powers of Trustees—Conferring Powers upon Commission—Intra Vires—British North America Act, 1867, sec. 93 (1)—"Right or Privilege with Respect to Denominational Schools"—Legislation Prejudicially Affecting—Appointment*

of Inspector — Use of French Language in Schools — Separate Schools Act, R.S.O. 1914, ch. 270, secs. 18 (a), 78 — “Regulations” — Department of Education Act, R.S.O. 1914, ch. 265.]—The Ontario statute 5 Geo. V. ch. 45, which provides for the suspension of the powers of the Ottawa Roman Catholic Separate School Board, and for conferring such powers upon a Commission, is within the legislative power of the Province.—The statute does not “prejudicially affect any right or privilege with respect to denominational schools” which “Roman Catholics” had, in Upper Canada, at the time of the passing of the British North America Act, 1867 (sec. 93, subsec. 1, of that Act).—In actions brought to recover control of the separate schools of Ottawa, of which, under the provisions of 5 Geo. V. ch. 45, the plaintiffs had been deprived, no evidence of any such prejudicial effect was given; and the actions were dismissed.—*Mackell v. Ottawa Separate School Trustees* (1915), 34 O.L.R. 335, followed.—The Legislature of Ontario has power to abolish all public schools, and so to abolish separate schools, for then there would be nothing to be separated from, and so no right or privilege of separation. *Ottawa Separate School Trustees v. City of Ottawa*, *Ottawa Separate School Trustees v. Quebec Bank*, 624.

See RAILWAY, 1.

#### CONTEMPT OF COURT.

Editor of Newspaper — Motion

to Commit—Comment on Matters in Question in Pending Action—Administration of Justice — Fair Trial—Failure to Shew Interference with—Dismissal of Motion—Costs.]—The power of the Court to punish for contempt is not to be exercised for the purpose of vindicating the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice. The jurisdiction ought not to be exercised except when there is a case made out shewing that it is probable that the publication will substantially interfere with a fair trial.—*Helmore v. Smith* (1886), 35 Ch.D. 449, 455, *In re Clements* (1877), 46 L.J.Ch. 375, 383, *Skipworth's Case* (1873), L.R. 9 Q.B. 219, 230, 235, and *In re "Finance Union"* (1895), 11 Times L.R. 167, 169, followed.—A motion by the plaintiff company to commit for contempt the editor of a newspaper for commenting, in an article therein published soon after the commencement of this action, upon the matters in question in the action, relating to municipal affairs which had previously been discussed in public, was dismissed, and with costs—the action being one which would be tried by a Judge without a jury, and the statements and comments of the newspaper being directed to the municipal electors and being such as could have no influence upon the proper conduct of the litigation and the due attainment of an impartial trial. *Meriden Britannia Co. Limited v. Walters, Re Lewis*, 518.

**CONTRACT.**

1. *Construction—Sale of Stock and Assets of Commercial Company—Ascertainment of Amount Payable—Correspondence between Solicitors — Modification — New Contract — Estoppel.*]—*Held*, reversing the judgment of MIDDLETON, J., 33 O.L.R. 183, that the meaning of clause 5 of the agreement in question was not doubtful or ambiguous; that neither the subsequent correspondence between the solicitors nor the transactions in or by the company could modify the plain contract or substitute a new contract in its place; that there was nothing upon which an estoppel could be founded; and that the plaintiffs were entitled to recover the amount claimed by them. *Toronto General Trusts Corporation v. Gordon Mackay & Co. Limited*, 101.

2. *Judicial Sale of Land by Tender—Satisfaction of Liens — Threat of Proceedings to Set aside Sale—Promise of Purchaser to Pay Profit on Resale to Lien-holders — Enforcement — Consideration—Forbearance—Statute of Frauds—Interest in Land—Action for Money.*]—Land being offered for sale by tender, under the direction of the Court, to satisfy liens upon it, the defendant was the highest tenderer and became the purchaser; but the plaintiffs, lien-holders, threatened proceedings to set aside the sale to the defendant, whereupon the defendant said to one of the plaintiffs: "If you drop the proceedings, when I sell the land whatever difference is between

what I get for it and what I pay I'll hand over to the lien-holders." There was nothing in writing. The plaintiffs took no proceedings, and the defendant obtained a vesting order. This was in 1909; and in January, 1915, the defendant sold the land at a profit:—*Held*, by BOYD, C., that the forbearance of the plaintiffs was sufficient consideration for the defendant's promise; that the Statute of Frauds had no application; and that the plaintiffs were entitled to judgment for the amount of the profit made by the defendant, to be applied in payment of what was owing to the lien-holders; that the plaintiffs' right of action arose upon and after the sale made by the defendant in 1915—the lapse of time did not affect the situation; that this money was derived from the sale of land, but the bargain was about the money alone, and was outside of the Statute of Frauds.—*Poulter v. Killingbeck* (1799), 1 B. & P. 397, and *Trowbridge v. Wetherbee* (1865), 93 Mass. (11 Allen) 361 (approved by STRONG, C.J., in *Stuart v. Mott* (1894), 23 S.C.R. 153, 384, 388), followed.—Upon appeal the judgment of BOYD, C., was varied by reducing the amount to be paid to the plaintiffs to such sum as remained due to them on their claim—not the whole surplus.—*Semble*, per MEREDITH, C.J.O., that the agreement set up was in substance an agreement that the defendant was to be a trustee of the property for the plaintiffs, and that was an agreement which

fell within the Statute of Frauds. *Leslie v. Stevenson*, 93, 473.

3. *Purchase of Bonds—Broker Becoming Purchaser—Finding of Fact—Evidence—Correspondence—Admissibility—Memorandum in Writing—Statute of Frauds—Breach of Contract—Damages—Actual Loss of Vendors.*—In an action for damages for breach of a contract to take and pay for a large number of bonds of a railway company, it was *held*, upon the evidence, that the defendant had constituted himself the actual purchaser of the bonds from the plaintiffs; the defendant acted not as agent, but as principal, in the transaction; that certain correspondence between the defendant and his associate, resident in a large financial centre, who was endeavouring to find a purchaser for the bonds, was admissible in evidence in the action, and was a sufficient memorandum in writing to satisfy the Statute of Frauds, R.S.O. 1914, ch. 102.—*Gibson v. Holland* (1865), L.R. 1 C.P. 1, followed.—*Held*, also, that the plaintiffs were entitled to recover, as damages for the defendant's breach of his contract, the amount of their actual loss, measured by the price which they afterwards obtained for the bonds, which was the best price possible, having regard to the condition of the market.—*In re Vic Mill Limited*, [1913] 1 Ch. 183, followed. *McKinnon v. Doran*, 403.

4. *Sale of Bank Shares—Written Offer—Ambiguity—Con-*

*temporaneous Interpretation by Conduct of Parties—Acceptance—Reasonable Time—Article of Fluctuating Value.*—Where a written offer is ambiguous, it may be construed according to the contemporaneous interpretation put upon it by the maker and receiver.—The third parties, Toronto brokers, offered the defendant 50 shares of Royal Bank stock at 202. Instead of accepting or rejecting, the defendant wrote to the plaintiffs, Montreal brokers: "I will sell 50 shares Royal Bank at 206. Please wire if you have a buyer on receipt hereof." The plaintiffs, treating this as an offer to sell to them, at once telegraphed an acceptance; and the defendant then signified his acceptance of the offer made on the previous day by the third parties; but they refused to deliver the shares; and the defendant did not carry out the sale to the plaintiffs:—*Held*, that the letter of the defendant was ambiguous; and, as he and the plaintiffs had, in subsequent correspondence and otherwise, treated it as an offer to sell to the plaintiffs, that contemporaneous interpretation should be adopted.—The third parties were *held* not liable over to the defendant; for their offer was not, having regard to the fluctuating nature of the article offered, accepted within a reasonable time. *Manning v. Carrique*, 453.

See APPEAL, 1, 3 — COMPANY, 1—DIVISION COURTS, 2 — GUARANTY—LANDLORD AND TENANT—MECHANICS' LIENS — NEGLIGENCE—PRINCIPAL AND AGENT

—PROMISSORY NOTE—SALE OF GOODS—STATUTE OF FRAUDS—STREET RAILWAY—VENDOR AND PURCHASER.

### CONTRIBUTORIES.

See BANKS AND BANKING, 2.

### CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT, 1—MINES AND MINERALS.

### CONVICTION.

See CRIMINAL LAW—LIQUOR LICENSE ACT—MUNICIPAL CORPORATIONS, 6.

### CORPORATION.

See COMPANY—LANDLORD AND TENANT, 2—MUNICIPAL CORPORATIONS.

### CORROBORATION.

See EXECUTORS AND ADMINISTRATORS, 1.

### COSTS.

*Discretion of Trial Judge—Leave to Appeal—Judicature Act, R.S.O. 1914, ch. 56, sec. 24—Scale of Costs—Jurisdiction of County Courts—Action Removed into Supreme Court—County Courts Act, R.S.O. 1914, ch. 59, sec. 22 (7).*—Where an action is by order transferred from a County Court to the Supreme Court of Ontario, the Judge before whom the action is tried has the usual discretion as to costs: sub-sec. (7) of sec. 22 of the County Courts Act, R.S.O. 1914, ch. 59, does not give any *prima facie* right to costs upon the Supreme Court scale—it applies to a case where the Judge

has made an order for costs generally, without limitation as to scale.—The ordinary jurisdiction of the County Courts in actions for damages for torts is limited to claims not exceeding \$500: any jurisdiction beyond that sum is a jurisdiction by consent substantially—evidenced on the part of the plaintiff by the claim made, and of the defendant in not objecting to the trial of such a claim in a County Court.—Where the plaintiff claimed \$2,500 damages in an action for a tort, brought in a County Court, and the action was removed into the Supreme Court, upon the application of the defendants, and tried by a Judge, who gave judgment for the plaintiff for \$300, with costs fixed at \$75, the Judge refused leave to the plaintiff to appeal as to the costs to a Divisional Court of the Appellate Division (sec. 24 of the Judicature Act, R.S.O. 1914, ch. 56).—The discretion to be exercised in granting leave to appeal from an order as to costs is that of the Judge who has made the order, and he should not act upon the discretion of any other Judge or of any Court. *Hibbard v. Township of York*, 377.

See ALIEN ENEMY, 2—BANKS AND BANKING, 1—CONTEMPT OF COURT—LIBEL—LIMITATION OF ACTIONS—MUNICIPAL CORPORATIONS, 5—RAILWAY, 4, 5—RECEIVER, 2—TRIAL—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER—WATER, 2, 3—WILL, 2.

### COUNTERCLAIM.

See PRACTICE.



**COUNTY COURT JUDGE.**

See RECEIVER, 2.

**COUNTY COURTS.**

See COSTS—PRACTICE.

**COURTS.**

See APPEAL—CONSTITUTIONAL LAW, 1—DIVISION COURTS — MUNICIPAL CORPORATIONS, 9 — PRACTICE—WOODMEN'S LIENS.

**COVENANT.**

*Conveyance of Land—Building Restriction—Negative Easement—Dominant and Servient Tenements—Effect of Tax Sale and Conveyance—Assessment Act, R.S.O. 1914, ch. 195, secs. 94, 178—Vendor and Purchaser—Objection to Title.*—A restrictive covenant in regard to building, contained in a deed of conveyance of land, creates an equitable interest analogous to a negative easement, requiring for its creation and continuance a dominant and servient tenement. If there is a dominant tenement, the owner, and he alone, can claim the benefit of the covenant. If there is not such a tenement, the claim upon the covenant, as against subsequent assignees or purchasers, entirely ceases, although the personal claim by the covenantee against the covenantor may still exist; and, if the claim is a mere personal one, it cannot form the basis of a valid objection to the title.—*London County Council v. Allen*, [1914] 3 K.B. 642, and *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, [1906] 1 Ch. 386, followed.—But, even where there are lands in the position of a dominant tenement,

a subsequent sale and conveyance for taxes of land subject to a restrictive covenant has the effect of conveying it, free from any claim under the covenant, to the tax purchaser.—Sections 94 and 178 of the Assessment Act, R.S.O. 1914, ch. 195, considered. — *Tomlinson v. Hill* (1855), 5 Gr. 231, and *Soper v. City of Windsor* (1914), 32 O.L.R. 352, followed. *Essery v. Bell* (1909), 18 O.L.R. 76, considered. *Re Hunt and Bell*, 256.

See DIVISION COURTS, 1.

**CRIMINAL LAW.**

1. *Common Nuisance — Street Railway—Overcrowding of Cars—Criminal Code, R.S.C. 1906, ch. 146, secs. 221, 222, 223 — Interpretation Act, R.S.C. 1906, ch. 1, sec. 28—Ontario Railway Act, R.S.O. 1914, ch. 185, secs. 163, 169 (2)—Indictment—Conviction—"Indictable Offence"—Punishment — Abatement — "Public Nuisance"—Injury Confined to Passengers — Systematic Overcrowding—Nuisance Continuing at Time of Indictment—Right to Limit Number of Passengers to be Carried in Car.*—Upon a case stated by RIDDELL, J., the conviction of the Toronto Railway Company, upon the verdict of a jury, upon an indictment for a common nuisance in overcrowding its cars, and thereby endangering the property and comfort of the passengers, was affirmed, and the reasons of RIDDELL, J. (*Rex v. Toronto R.W. Co.* (1911), 23 O.L.R. 186), approved.—Section 223 of the Criminal Code leaves untouched the common

law right to proceed by indictment or information, but prevents persons convicted of the nuisances to which that section applies from being punished, as they might be according to the common law, by fine or imprisonment, and limits the proceedings after a conviction to the remedy of abatement of the nuisance. — An “indictable offence,” as that term is used in the Code, is a criminal offence. — The overcrowding of the company’s cars constituted a public or common nuisance, notwithstanding that it affected only those who became passengers in the cars, and not all of the public. — Review of the authorities. — Judgment for the abatement of it on a conviction for a public nuisance cannot be given unless the nuisance continues at the time of the indictment, which was shewn in this case. *Rex v. Toronto R.W. Co.*, 589.

2. *Conspiracy—Indictment of two Defendants and “Others”—Acquittal of one Defendant—Conviction of Remaining Defendant—Inciting and Assisting Alien to Join Enemy’s Forces—Conspiracy between Defendant and Alien Named in Indictment but not as Conspirator — Evidence.*] — The two defendants, N. and his wife, were indicted for that they did “maliciously and traitorously conspire, confederate, and agree with each other, and with others, to aid and comfort the enemy of His Majesty the King by inciting and assisting one Z., a German subject of the Emperor of Ger-

many, a public enemy now at war with His Majesty the King, to leave the Dominion of Canada and join the enemy’s forces,” etc. The jury rendered a verdict of “not guilty” as to the wife, and of “guilty” as to N.:— *Held* (HODGINS, J.A., dissenting), upon a case stated by the trial Judge, that N. could not under the indictment be guilty of conspiring with Z. to aid the enemy by aiding and assisting Z. to leave Canada and join the enemy’s forces; and, there being no evidence of N. conspiring with any person other than Z., N., as well as his wife, should be acquitted. *Rex v. Nerlich*, 298.

3. *Indictment for Seduction of Girl under 21—Criminal Code, sec. 212—Proof of Age—Best Evidence not Obtainable — Hearsay Testimony — Admissibility — Effect of sec. 984.*] — Upon indictment of the prisoner, under sec. 212 of the Criminal Code, for an offence committed upon a woman under twenty-one, it was *held*, that, the woman’s mother being dead, the evidence of herself and of a woman with whom she had gone to live when quite young, was admissible to prove her age. — *Regina v. Cox*, [1898] 1 Q.B. 179, followed. — The omission to include sec. 212 of the Code in the provision (sec. 984) which makes it competent for the Judge or jury to form their own conclusions as to the age of a person from his appearance, has not the effect of rendering this class of evidence inadmissible. *Rex v. Spera*, 539.

4. *Keeping Common Gaming-house — Conviction — Evidence — “Nickel-in-the-Slot” Machine — Game of Chance—Element of Certainty—“Keeper” of Premises—Criminal Code, secs. 226, 228, 986.*]—The defendant, a tobaccoist, who had in his shop a “nickel-in-the-slot” machine, was convicted for unlawfully keeping a disorderly house, that is to say, a common gaming-house; and it was held, upon a case stated, that there was evidence that the offence charged had been committed: each depositor of a coin in the machine was taking part in a game of chance; there was no element of certainty except as to the minimum to be received—there was no certainty as to the maximum, as the statement of the working of the machine (given below) disclosed. — *Rex v. Langlois* (1914), 23 Can. Crim. Cas. 43, and *Rex v. Stubbs* (1915), 31 W.L.R. 567, not followed.—Section 986 of the Criminal Code (as enacted in 1913 by 3 & 4 Geo. V. ch. 13, sec. 29) makes the keeping of any means or contrivance for unlawful gaming *prima facie* evidence of a disorderly house, in prosecutions under sec. 228 (R.S.C. 1906, ch. 146), which, in sub-sec. 1, fixes the punishment for keeping a disorderly house, that is to say, *inter alia*, a common gaming-house as defined in sec. 226, and in sub-sec. 2 (as enacted by sec. 10 of ch. 13 of 3 & 4 Geo. V.) declares who shall be deemed a keeper. There was sufficient evidence that the defendant was the keeper of the premises and interested in the

operation of the machine. *Rex v. O'Meara*, 467.

5. *Obstructing Peace Officer—Criminal Code, sec. 169—Summary Conviction by Police Magistrate—Indictable Offence—Option of Crown—Procedure — Mode of Trial — Consent of Accused — Secs. 773 (e) and 778 of Code.*]—Section 169 of the Criminal Code, R.S.C. 1906, ch. 146, creates the offence of wilfully obstructing a peace officer in the execution of his duty, and gives the Crown the right to proceed against one accused of that offence, either under the summary convictions sections of the Code (Part XV.), or by indictment. If the procedure is by indictment, the accused has the right of election afforded by sec. 778, and upon conviction more serious punishment may follow. The right to choose the mode of prosecution is in the Crown; the sole right of the accused is to select the tribunal to try him where the Crown elects to prosecute for an indictable offence. And where the Crown elects to adopt the summary convictions procedure, the right of a Police Magistrate to try the accused does not depend upon the latter's consent; the summary trials procedure (Part XVI. of the Code, secs. 771 to 799) is inapplicable. Section 773 (e) mentions this particular offence as one of the indictable offences for which a person may be tried summarily; but it relates to cases where the procedure by indictment is adopted.—*Regina v. Crossen* (1899), 3 Can. Crim. Cas. 152, and *Rex v. Car-*

*michael* (1902), 7 Can. Crim. Cas. 167, not followed.—*Rex v. Nelson* (1901), 4 Can. Crim. Cas. 461, approved.—And it was *held*, upon *habeas corpus*, that the accused in this case was properly tried and summarily convicted by a Police Magistrate. *Rex v. West*, 368.

6. *Police Magistrate — Adjournalment — Jurisdiction — Evidence—Trial de Novo — Remand “till Called on” without Adjudication of Guilt — Prohibition — Criminal Code, secs. 722, 1081.*—The accused was brought before a magistrate upon a charge of keeping a common betting-house; the evidence for the Crown was heard, the accused was called upon for her defence, and gave her evidence. The accused was then “remanded for trial till called on;” the next day she was summoned to appear before the magistrate, and upon the return of that summons the Crown proposed to give new evidence, not before known to the Crown, and not evidence in reply:—*Held*, that the magistrate had no jurisdiction to proceed in this way: if the evidence first given was insufficient to establish the Crown’s case, the accused should be acquitted; and an order of prohibition was granted.—The adjournment was not such as is contemplated by sec. 722 of the Criminal Code; and the power to suspend sentence given by sec. 1081 cannot be exercised until there has been an adjudication of guilt. *Re Rex v. White*, 370.

7. *Rape — Conviction — Ap-*

*plication by Accused for Stated Case—Refusal by Trial Judge—Absence of Doubt—Evidence — Letter—Instructions to Jury.*—Upon the trial of a person for an offence against the criminal law, the trial Judge should not state a case for the opinion of a court of appeal unless he has some doubt in the matter upon which it is suggested that a question be reserved. And in this case, an application by the defendant, upon his conviction for rape, for a stated case in respect of the instructions given to the jury about a certain letter referred to in the evidence, but not produced, was refused.—*Wilmont’s Case* (1914), 10 Cr. App. R. 173, distinguished. *Rex v. Batterman*, 225.

8. *Treason—Attempt to Commit — Evidence — Criminal Code, secs. 72, 74—“Assisting” Aliens to Leave Canada to Join Enemy’s Forces—Overt Acts Forming Part of a Series — Trap-evidence — Enemies not Desiring to Leave Canada — Jury — Verdict — Form of.*—The prisoner was indicted for treason—assisting the public enemy (clause (i) of sec. 74 of the Criminal Code), by inciting and assisting four named persons, subjects of the Emperor of Austria, a public enemy now at war with His Majesty the King, to leave Canada and join the enemy’s forces, etc. Counsel for the Crown did not ask for a conviction for treason, but for an attempt to commit the treason with which the prisoner was charged. The jury found the

prisoner "guilty of attempting to commit treason, but did not realise the seriousness of his act."—*Held*, that this was not equivalent to a verdict of "not guilty;" it was a verdict of "guilty," with a rider. — Under clause (i) of sec. 74 the treason consists in "assisting," and the forming and manifesting by any overt act of an intention to assist is, under the Code, not treason, but is an indictable offence (an attempt) under sec. 72.—An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted; and the bargain the prisoner made with one B., and his acts with reference to the four aliens, were overt acts forming part of such a series.—*Rex v. Linneker*, [1906] 2 K.B. 99, and *Regina v. Taylor* (1859), 1 F. & F. 511, followed. — There was no evidence that the prisoner incited the men or any of them to leave Canada, and it could not be said that he assisted them to leave or attempted to do so: to assist another involves the idea of a desire, or at least a willingness, to be assisted on the part of the person who is said to have been assisted.— Therefore, there was no evidence proper to be submitted to the jury of the offence charged in the indictment, or of an attempt to commit it. *Rex v. Snyder*, 318.

See EVIDENCE, 2 — LIQUOR LICENSE ACT—MUNICIPAL CORPORATIONS, 6.

### CROWN.

See ASSESSMENT AND TAXES, 3  
—WATER, 1.

### DAMAGES.

See ARBITRATION AND AWARD  
—CONTRACT, 3—LAND — LANDLORD AND TENANT, 1 — MINES AND MINERALS—RAILWAY, 2, 5  
—SALE OF GOODS, 2—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER—WATER, 1, 3.

### DEATH.

See INSURANCE — PARTNERSHIP, 1—WILL.

### DECLARATORY JUDGMENT.

See CONSTITUTIONAL LAW, 1.

### DEED.

See CHURCH — COVENANT — LIS PENDENS — MORTGAGE — TRUSTS AND TRUSTEES.

### DEFAMATION.

See LIBEL.

### DEFECTIVE SYSTEM.

See MINES AND MINERALS.

### DEFECTIVE WORKMANSHIP.

See SALE OF GOODS, 3.

### DEPARTMENT OF EDUCATION.

See CONSTITUTIONAL LAW, 2,  
3—SCHOOLS.

### DEVISE.

See WILL.

### DIRECTORS.

See COMPANY, 2—STATUTE OF FRAUDS.

**DISCOVERY.**

*Examination of Co-defendant—“Party Adverse in Interest” — Rule 327—Action to Establish Will—Defendant in same “Interest” as Plaintiff.]—Having regard to the genesis of Rule 327, now in force in Ontario, and to the practice which has obtained, it is not competent to introduce the limitations as to examination of co-defendants which are found in the English practice, under Rules differently framed and expressed. In the Ontario practice, an actual issue in tangible form spread upon the record is not essential, so long as there is a manifest adverse interest in one defendant as against another defendant. — *Moore v. Boyd* (1881), 8 P. R. 413, approved. *Fonseca v. Jones* (1909), 19 Man. R. 334, disapproved. Review of the English authorities.—Origin and history of Rule 327.—In an action to establish a will, a defendant who was entitled thereunder to a substantial legacy was held “adverse in interest” to a class of defendants who were contesting the validity of the will on the ground of undue influence and incapacity; and an order was made compelling her attendance for examination for discovery at their instance. *Menzies v. McLeod*, 572.*

See **BANKS AND BANKING**, 2.

**DISCRETION.**

See **COMPANY**, 3 — **COSTS** — **MINES AND MINERALS**—**MUNICIPAL CORPORATIONS**, 2, 7.

**DISTRESS.**

See **COMPANY**, 4.

**DISTRICT COURTS.**

See **WOODMEN’S LIENS**.

**DIVIDENDS.**

See **COMPANY**, 2.

**DIVISION COURTS.**

1. *Jurisdiction—Title to Land—Action to Recover Sale-deposit—Title Defective owing to Breach of Restrictive Building Covenant — Division Courts Act, R.S.O. 1914, ch. 63, sec. 61 (a)—Appeal—Evidence not Certified—Secs. 127, 128.]—Where an action for the return of a sum of money paid by the purchaser to the vendor, as a deposit upon a contract for the sale and purchase of land, involves the question of the possession, at the date of the contract or trial, of either a good or defective title to the land in the defendant, a Division Court has no jurisdiction: sec. 61 (a) of the Division Courts Act, R.S.O. 1914, ch. 63.—*Seem*, that the question whether or not a restrictive building covenant has ceased to bind the land is one of difficulty, and it should not, even if there were jurisdiction, be determined in a Division Court. —*Elliston v. Reacher*, [1908] 2 Ch. 374, 384, referred to.—Upon appeal from the judgment of a Division Court, the appellate Court cannot decide whether the judgment is right without the evidence taken by the Judge in the Division Court being before it (secs. 127 and 128). *Luttrell v. Kurtz*, 586.*

2. *Territorial Jurisdiction — Cause of Action, where Arising—Contract — Correspondence —*

*Division Courts Act, R.S.O. 1914, ch. 63, sec. 72—Prohibition.*]—The plaintiff, who had an establishment in H., sent from there a copy of a circular letter to the defendant at O., where she lived, advising her to send in old hat shapes to be reshaped, and quoting prices. In response to this, the defendant sent from O. to the plaintiff at H. some hats to be reshaped, accompanied by a letter. The plaintiff said that he reshaped the hats and returned them; he sued for the price in the Division Court at H.; the defendant disputed his claim; and the Judge in the Division Court at H. ordered that the action should be transferred to the Division Court at O.:—*Held*, that the cause of action did not arise wholly in H., but partly in O.: the receipt of the circular letter at O. was a part of the cause of action, although the letter did not amount to a technical offer; and the writing of the letter accompanying the goods from O. was also a part of the cause of action.—*In re Hagel v. Dalrymple* (1879), 8 P.R. 183, approved and followed.—*Cowan v. O'Connor* (1888), 20 Q.B.D. 640, not followed. *Re McNeilly v. Bennett*, 400.

See MUNICIPAL CORPORATIONS,  
3.

#### DOG TAX AND SHEEP PROTECTION ACT.

See MUNICIPAL CORPORATIONS,  
3.

#### DRAINAGE.

See MUNICIPAL CORPORATIONS,  
4.

#### EASEMENT.

See COVENANT—WATER, 3.

#### EDUCATION.

See CONSTITUTIONAL LAW, 2, 3  
—SCHOOLS.

#### ELECTION.

See COMPANY, 1—PRACTICE.

#### ENGINEER.

See STREET RAILWAY.

#### EQUITABLE OBLIGATION.

See MORTGAGE.

#### ESTOPPEL.

See CONTRACT, 1—MECHANICS'  
LIENS, 1.

#### EVIDENCE.

1. *Appeal—Motion for Leave to Adduce Fresh Evidence.*]—After these actions had been tried and judgment had been given by the trial Judge, and an appeal therefrom had been heard but not disposed of, the brewery company, the purchasers of two boilers from the manufacturing company, made a motion to the appellate Court for leave to adduce evidence that a crack had recently been discovered in the second boiler—similar to what was shewn in the first boiler:—*Held*, that the evidence, if admitted, could not affect the result of the actions, as the crack was not shewn to have arisen from either of the defects on which the purchasers based their case; and the motion was refused. *Grant's Spring Brewery Co. Limited v. E. Leonard & Sons Limited, E. Leonard & Sons Limited v.*

*Grant's Spring Brewery Co. Limited*, 429.

2. *Order for Examination of Person in Ontario—Testimony for Use in French Court—Letters Rogatory—Criminal Proceedings against Examinee—Right to Examine Accused—French Law—Canada Evidence Act, R.S.C. 1906, ch. 145, secs. 41, 45.*]—Letters rogatory were issued from a French Court seeking the aid of the Supreme Court of Ontario in obtaining the testimony of a person within the jurisdiction of the Ontario Court in relation to criminal proceedings pending against him in the French Court:—*Held*, that an order should be made, under sec. 41 of the Canada Evidence Act, R.S.C. 1906, ch. 145, for the examination upon oath in Ontario of the person referred to, and commanding his attendance for examination, leaving it to him to object (if he should see fit) to undergo any examination or to answer any questions, upon the ground that to answer might incriminate him: sec. 45 of the Act.—*Semble*, that the law of France authorises the examination of the accused, and so differs from English and Canadian law.—*Desilla v. Fells and Co.* (1879), 40 L.T.R. 423, and *Eccles & Co. v. Louisville and Nashville R.R. Co.*, [1912] 1 K.B. 135, referred to. *Re Isler*, 375.

See APPEAL, 1—ARREST—COMPANY, 3—CONTRACT, 3—CRIMINAL LAW, 2, 3, 4, 6, 7, 8—DIVISION COURTS, 1—INSURANCE, 1—LANDLORD AND TEN-

ANT, 2—LIMITATION OF ACTIONS—LIQUOR LICENSE ACT—MASTER AND SERVANT, 2—MECHANICS' LIENS, 4, 5, 6—MINES AND MINERALS—MORTGAGE—MUNICIPAL CORPORATIONS, 7, 8—PROMISSORY NOTE—RAILWAY, 5—SALE OF GOODS, 3.

## EXAMINATION OF PARTIES.

See DISCOVERY.

## EXAMINATION OF WITNESSES.

See EVIDENCE, 2.

## EXCAVATION.

See LAND.

## EXCHANGE OF LANDS.

See MORTGAGE.

## EXECUTION.

*Leave to Renew—Judicial Act—"Action"—Life of Judgment—Limitations Act, R.S.O. 1914, ch. 75, secs. 2 (a), 49 (1) (b)—Previous Renewals—New Starting-point.*]—An application made in 1915 for leave to issue execution upon a judgment recovered in 1883 was *held* to have been properly refused, on account of the bar imposed by the Limitations Act, now R.S.O. 1914, ch. 75, sec. 49 (1) (b). What is prohibited is the bringing of an "action" after the lapse of the statutory period (20 years); and, by sec. 2 (a), "action" includes any civil proceeding. The application was an "action;" and the renewal from time to time until 1905 of an execution issued in 1884, did not give a new starting-point. The present Rules (533 *et seq.*) relating to the issue of



execution are subject to the statutory limitations; and the granting of leave is a judicial act—not a mere ministerial act, which may be done after the time limited.—*Poucher v. Wilkins* (1915), 33 O.L.R. 125, distinguished.—Viewing the order giving leave to issue execution as the equivalent of an order of revivor or the entry of a suggestion on the roll under the old practice, it would not be effectual unless the application therefor were made within the 20 years.—Review of the authorities. *Doel v. Kerr*, 251.

#### EXECUTORS AND ADMINISTRATORS.

1. *Claim upon Estate of Intestate—Promise to Provide for Claimant by Will—Evidence—Corroboration—Service of Claimant for Long Period—Wages—Confinement to 6 Years—Limitations Act, R.S.O. 1914, ch. 75, sec. 49 (g)—Waiver by Administrator—Rights of Beneficiaries—Contest in Surrogate Court—Beneficiaries Made Parties—Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 69 (5).*—After the death of R., a claim for \$6,000 was made upon his estate by a woman who alleged that R. had promised to compensate her by his will for her services to him during a period of 20 years. R. died intestate, and the administrator of his estate notified the claimant, under sec. 69 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, that he disputed her claim; whereupon she applied to the Judge of a Surrogate Court for an order allowing her claim; and

he allowed the claim to the extent of \$2,340, being at the rate of \$2.25 per week for the period of 20 years. The evidence of the claimant—which was corroborated—was, that she remained with R., and worked for him, in reliance upon his promise “that he had plenty and could do for me as if I were his own girl; he would provide for me, and I did not have to go away and earn.”—*Held*, that, although the words of the promise were not clear, the Judge was justified in inferring that what was intended was that the claimant should be provided for, not only during R.’s lifetime, but also by his will.—*Held*, however, that the Judge should have given effect to the Limitations Act, R.S.O. 1914, ch. 75, sec. 49 (g), and confined the allowance to a period of 6 years before the death: the administrator might not choose to take advantage of the statute; but, the matter having been brought into Court, the beneficiaries, who had a *locus standi* under sec. 69 (5), had the right to insist upon the statute.—*In re Wenham*, [1892] 3 Ch. 59, applied. *Re Rutherford*, 395.

2. *Foreign General Administratrix—Administration of Assets in Ontario by Ontario Administrators—Disposition of Balance—Interest of Infant—Payment to Foreign Administratrix—Payment into Court—Trustee Act, R.S.O. 1914, ch. 121, sec. 38 (2).*—A person resident in a foreign country died there, intestate, and letters of administration of his whole estate were issued to his

widow by a Probate Court having jurisdiction in his place of abode. A part of his estate consisted of personalty in Ontario, and letters of administration in reference to that part were issued to a trust company by a Surrogate Court in Ontario. The trust company administered the Ontario assets, and had a balance in their hands after payment of expenses, etc. This was claimed by the widow as general administratrix. One of the persons beneficially entitled to a share of the estate was an infant:—*Held*, that the whole of the money should be paid to the foreign administratrix.—The passing of the accounts of the Ontario administrators was not the “passing of the final accounts,” within the meaning of sec. 38 (2) of the Trustee Act, R.S.O. 1914, ch. 121—it was in fact only a collection by the Ontario administrators for the home administratrix, to enable her to pass the accounts and make final distribution. *Re Law*, 222.

*See* ALIEN ENEMY, 1, 2.

#### **EXECUTORY CONTRACT.**

*See* TRUSTS AND TRUSTEES.

#### **EXEMPTION.**

*See* ASSESSMENT AND TAXES, 2, 3.

#### **EXPERT TESTIMONY.**

*See* MINES AND MINERALS — RAILWAY, 5.

#### **EXPROPRIATION.**

*See* MUNICIPAL CORPORATIONS, 5—RAILWAY, 2, 3, 4.

#### **EXTRAS.**

*See* MECHANICS' LIENS, 3.

#### **FATAL ACCIDENTS ACT.**

*See* ALIEN ENEMY, 1, 2.

#### **FISHERY LICENSE.**

*See* WATER, 2.

#### **FLOATABLE STREAM**

*See* WATER, 1, 4.

#### **FOOTWAY.**

*See* RAILWAY, 5.

#### **FOREIGN ADMINIS- TRATRIX.**

*See* EXECUTORS AND ADMINIS-  
TRATORS, 2.

#### **FRANCHISE.**

*See* STREET RAILWAY.

#### **FRAUD.**

*See* PARTNERSHIP, 2.

#### **FRAUDULENT DEBTORS ARREST ACT.**

*See* ARREST.

#### **FRENCH LANGUAGE.**

*See* CONSTITUTIONAL LAW, 2,  
3—SCHOOLS.

#### **FRENCH LAW.**

*See* EVIDENCE, 2.

#### **FRESHET.**

*See* WATER, 1.

#### **GAMING-HOUSE.**

*See* CRIMINAL LAW, 4.

#### **GIFT.**

*See* WILL.

#### **GOODWILL.**

*See* PARTNERSHIP, 1.

### GUARANTY.

1. *Bank—Condition Precedent to Liability—Implied Term or Condition—Sale of Goods—Bill of Exchange—Bills of Lading—Form of.*]—M., in Ontario, bought, in California, two car-loads of goods, to be shipped to Ontario. The defendants, M.'s bankers in Ontario, telegraphed to the plaintiffs, the vendors' bankers in California, guaranteeing payment of drafts on M. "with bills lading attached," not exceeding a named sum, covering the two car-loads of goods, describing them. Bills of lading attached to a draft were forwarded, and the draft was refused. In the bills of lading, the vendors were named as consignees as well as consignors—"notify M." being added after the name of the vendors as consignees. On the face of the bills of lading appeared: "Deliver without bills lading on written order of (vendors') agent:"—*Held*, that, as the bills of lading were attached to the draft, the condition of the guaranty was literally fulfilled; but the object of attaching the bills of lading to the draft was the security of the defendants; and there was implied in the guaranty a further condition that the bills should be such as would afford protection to the defendants.—In construing a contract, a term or condition not expressly stated may, in certain circumstances, be implied by the Court.—Review of the authorities. *The Moorcock* (1889), 14 P.D. 64, specially referred to.—And *held*, that, as the bills of lading sent did not pre-

vent the goods being dealt with (and lawfully dealt with so far as the carrier was concerned) without the defendants' consent, they were not such bills as the defendants had a right to receive before being bound by their guaranty. *Pioneer Bank v. Canadian Bank of Commerce*, 531.

2. *Indefinite Basis of Contract—Increase in Liability—Release of Guarantor—Absence of Prejudice and Concealment—Duty of Disclosure—Variation of Sealed Contract by Unsealed Instrument—Construction and Scope of Contract.*]—*Held*, upon the evidence, in an action upon two guaranties, that the arrangement by which the K. company purchased an agency for \$4,250 was a device by which the plaintiffs were to be recouped out of the profits of the business for the amount paid out to acquire control of the stock of the K. company; but that did not affect the liability of the defendant; the basis of the contract was not fixed and definite; nothing was done to prejudice the defendant; there was no deliberate concealment; there is no universal obligation to make disclosure in cases of guaranty; and the defendant was not released.—*Holme v. Brunskill* (1877), 3 Q.B.D. 495, distinguished.—*Stewart v. McKean* (1855), 10 Ex. 675, *Webster v. Petre* (1879), 4 Ex. D. 127, *Stewart v. Young* (1894), 38 Sol. J. 385, and *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469, applied and followed.—(2) The words of the

later guaranty "just as if you had incorporated a new company" meant "to the full extent contemplated in case a new company had been incorporated," and substituted another state of affairs, upon the completion of which the earlier guaranty became effective; and the later guaranty was not limited to so much of the earlier one as dealt with the indebtedness of the K. company recited therein.—(3) A guaranty need not be under seal; and *quære* whether the rule that an attempted alteration of a contract under seal by an instrument not sealed is ineffective, is applicable where the original contract does not require a seal to make it valid.—(4) The guaranties did not cover notes given for the acquisition of the exclusive agency; the contract of guaranty is *strictissimi juris*. *K. and S. Auto Tire Co. Limited v. Rutherford*, 639.

#### **HAWKERS AND PEDLARS.**

See MUNICIPAL CORPORATIONS, 6.

#### **HEARSAY TESTIMONY.**

See CRIMINAL LAW, 3.

#### **HIGHWAY.**

*Nonrepair — Cement Sidewalk in City Street—Neglect to Roughen Surface—Dangerous Condition — Notice to City Corporation—Injury to Person — Knowledge of Dangerous Condition — Reasonable Care—Municipal Act, R.S.O. 1914, ch. 192, sec. 460.*—The defendant city corporation, having originally corrugated the surface of a cement sidewalk, must be

taken to have recognised that, if it should become smooth, it would be dangerous, and ought to be again roughened; and, nothing having been done to make the walk safe, it must be regarded as out of repair and dangerous; the dangerous condition had existed for so long as to impute notice to the corporation; it was this want of repair that caused the plaintiff's injury; there was no want of care on the plaintiff's part; and his knowledge of the dangerous condition did not stand in the way of his recovering damages from the corporation for its neglect of its statutory duty to keep the streets and walks in repair: *Municipal Act, R.S.O. 1914, ch. 192, sec. 460.—Caswell v. St. Mary's and Proof Line Junction Road Co.* (1869), 28 U.C.R. 247, 254, and *Gordon v. City of Belleville* (1887), 15 O.R. 26, 28, 30, applied and followed. *Huth v. City of Windsor*, 245, 542.

See WATER, 3.

#### **HIRED VEHICLE.**

See MASTER AND SERVANT, 2.

#### **HOSPITAL.**

See NEGLIGENCE.

#### **HUSBAND AND WIFE.**

See LIS PENDENS.

#### **IMPROVEMENTS.**

See WATER, 1.

#### **INDICTMENT.**

See CRIMINAL LAW, 1, 2, 3.

**INFANT.**

See EXECUTORS AND ADMINISTRATORS, 2.

**INJUNCTION.**

See ASSESSMENT AND TAXES, 1—SCHOOLS.

**INSPECTION.**

See SALE OF GOODS, 1.

**INSPECTOR.**

See COMPANY, 3—CONSTITUTIONAL LAW, 3.

**INSURANCE.**

1. *Life Insurance — Disappearance of Beneficiary—Endorsement Made by Insured in Favour of Beneficiary two Years after Disappearance—Presumption of Death—Trust—Time for Commencement of Seven-year Period—Improbability of Absentee Communicating with Friends—Effect on Presumption — Evidence — Onus.*—If it is proved that for a period of seven years no news of a person has been received by those who would naturally hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead. *Sed quære*, whether the presumption applies to the case of a person who would have been unlikely to communicate with his friends. — Review of the authorities.—A young man disappeared in 1907, and had not since been heard of. He was (and was aware of the fact) one of the beneficiaries named in a policy of insurance on the life of his father, existing at the time

of his disappearance. By an endorsement made two years after the disappearance, the father re-apportioned the benefits under the policy, giving the absent son a larger share. The father died in 1912:—*Held*, that the endorsement was in effect a declaration of trust in the son's favour; he must be taken to have been living at the date of the endorsement, the onus of proving death before that date being upon the representatives of the father; and, therefore, death ought not to be presumed until the lapse of seven years from the date of the endorsement.—*In re Corbishley's Trusts* (1880), 14 Ch.D. 846, followed.—The money should be distributed upon the assumption that the son did not survive the father. The onus is upon the representatives of a beneficiary to prove that he survived the insured.—*Re Phillips and Canadian Order of Chosen Friends* (1906), 12 O.L.R. 48, followed. *Re Pinsonneault*, 388.

2. *Life Insurance—Policies Declared to be for Benefit of Wife and Children—Rights of Children of Deceased Children—Retrospective Legislation — Insurance Act, R.S.O. 1914, ch. 183, secs. 170, 171 (9), 178 (1), (7).*—The provisions of the Insurance Act, R.S.O. 1914, ch. 183, were held applicable to policies of life insurance effected in 1850 and 1851, the insured dying in 1915: sec. 170.—Section 171 makes provision for the case of beneficiaries other than preferred beneficiaries; and sec. 178 deals with the rights of preferred bene-

ficiaries—a class defined in sub-sec. 1, and including grandchildren.—Notwithstanding that the policies had been declared by the insured to be for the benefit of his wife and children, under sec. 178 (7) the children of deceased children were *held* entitled to share, and not merely the survivor of the original class, who would be alone entitled under sec. 171 (9). *Re Standard Life Assurance Co. and Keefer*, 235, 427.

### INTEREST.

See MUNICIPAL CORPORATIONS, 5.

### INTOXICATING LIQUORS.

See LIQUOR LICENSE ACT — MUNICIPAL CORPORATIONS, 7, 8, 9.

### ISSUE.

See LIMITATION OF ACTIONS.

### JUDGMENT.

See CONSTITUTIONAL LAW, 1—EXECUTION — MUNICIPAL CORPORATIONS, 9—RECEIVER, 1.

### JUDICIAL KNOWLEDGE.

See LIQUOR LICENSE ACT.

### JUDICIAL SALE.

See CONTRACT, 2.

### JURISDICTION.

See ARBITRATION AND AWARD — CONSTITUTIONAL LAW—COSTS — CRIMINAL LAW, 6—DIVISION COURTS—LIBEL — MASTER AND SERVANT, 1—MUNICIPAL CORPORATIONS, 1—RAILWAY, 1, 4—WOODMEN'S LIENS.

### JURY.

See CRIMINAL LAW, 7, 8 — MASTER AND SERVANT, 1—TRIAL.

### KEEPING COMMON GAMING-HOUSE.

See CRIMINAL LAW, 4.

### LACHES.

See MUNICIPAL CORPORATIONS, 1.

### LAKE.

See WATER, 2.

### LAND.

*Right of Land-owner—Lateral and Subjacent Support — Interference with Natural Condition—Excavation and Removal of Sand from Adjoining Lot—Operations of Nature Facilitated by Wrongful Act—Damages.*—The right of the owner of land is, to have it left in its natural plight and condition without interference by the direct or indirect action of nature facilitated by the direct action of the owner of the adjoining land. Each land-owner must so use his own land that he shall not interfere with or prevent his neighbour enjoying the land in its natural condition. The right is more properly described as a right of property than as an easement; and it has been applied not only to the case of lateral but of subjacent support.—*Dalton v. Angus* (1881), 6 App. Cas. 740, 791, 808, *Jordeson v. Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, and *Trinidad Asphalt Co. v. Ambard*, [1899] A.C. 594, followed.—This principle was applied in a case where the plain-

tiff and defendant owned adjoining lots of land having upon them a sandy beach, and the destruction of the plaintiff's property was brought about by the act of the defendant in removing sand from his lot, so that the action of the wind and water in washing away a large portion of the plaintiff's sandy beach was facilitated; and the plaintiff had judgment for \$750 damages. *Cleland v. Berberick*, 636.

See COVENANT — LIS PENDENS — MORTGAGE — MECHANICS' LIENS—MUNICIPAL CORPORATIONS, 5—PARTNERSHIP, 2 — PRINCIPAL AND AGENT — RAILWAY, 2, 3, 4—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER — WATER, 3—WILL, 1.

### LANDLORD AND TENANT.

1. *Lease of Flat in Building—Implied Stipulation to Furnish Heat—Collateral Contract — Statute of Frauds—Damages for Inadequate Heating—Reformation of Lease.*—The top-flat of a building was leased by the defendant to the plaintiff as "steam-heated." The written lease, signed by the plaintiff, made no mention of heating; steam-heating was in fact provided, but was inadequate.—*Held*, by MIDDLETON, J., and affirmed by a Divisional Court on appeal, that there was an implied collateral promise or contract, and a breach thereof; that the action lay, notwithstanding the relationship of landlord and tenant; that the Statute of Frauds was not an answer; and that the plaintiff was entitled to recover damages

in respect of the loss of time of men employed by him and the extra cost of attempting to heat the flat, and also damages for the general loss and inconvenience resulting from the breach of the implied contract.—*Hamlyn & Co. v. Wood & Co.*, [1891] 2 K.B. 488, *Ex p. Ford* (1885), 16 Q.B.D. 305, *Lamb v. Evans*, [1893] 1 Ch. 218, and *De Lassalle v. Guildford*, [1901] 2 K.B. 215, applied and followed. — *Per* MEREDITH, C.J.O., in the Divisional Court, that a case had been made for reformation of the plaintiff's lease. *Brymer v. Thompson*, 194, 543.

2. *Tenant Overholding and Paying Rent — Presumption — Evidence—Tenancy from Year to Year — Corporation-tenant.*] — The presumption that a new tenancy beginning after the expiration of a lease is from year to year may be met by evidence of another and different tenancy; but, if no other tenancy appear, the presumption is not met.—*Roe dem. Brune v. Prideaux* (1808), 10 East 158, referred to. —The defendants, an incorporated company, tenants under a sealed lease from the plaintiff, took possession and continued in possession after the expiration of their term, and paid rent monthly at the rent reserved by the lease, and were *held*, to be tenants from year to year, no other tenancy being shewn.—Where a valid tenancy actually exists, the consequences of overholding and paying rent are the same for a corporation-tenant as any other.—*Finlay v. Bristol and*

*Exeter R.W. Co.* (1852), 7 Ex. 409, and *Garland Manufacturing Co. v. Northumberland Paper and Electric Co. Limited* (1899), 31 O.R. 40, considered and distinguished.—*Doe dem. Pennington v. Tanriere* (1848), 12 Q.B. 998, followed. *Young v. Bank of Nova Scotia*, 176.

#### LATERAL SUPPORT.

See LAND.

#### LEASE.

See LANDLORD AND TENANT—  
VENDOR AND PURCHASER.

#### LEAVE TO APPEAL.

See COSTS—LIBEL—RECEIVER,  
2.

#### LETTERS ROGATORY.

See EVIDENCE, 2.

#### LIBEL.

*Newspaper—Security for Costs—Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 12—Order of Master in Chambers Refusing Motion for Security—Jurisdiction of Master—Appeal from Master's Order—Reversal by Judge in Chambers—Order for Security and Dismissing Action in Default—Right of Appeal to Appellate Division—Rule 507—Leave to Appeal—Substantive Order—Subsec. 4 of sec. 12.*—In an action for a libel published in a newspaper, the defendant company, the publisher, applied to the Master in Chambers, under sec. 12 of the Libel and Slander Act, R.S.O. 1914, ch. 71, for an order for security for costs, upon an affidavit of the editor of the newspaper, which stated, "I am

satisfied, after diligent inquiry, that the plaintiff is not possessed of property sufficient to answer the costs of the action," etc. The Master refused the application; the defendant company appealed from the Master's order to a Judge in Chambers, and at the same time applied to the Judge for a substantive order for security for costs:—*Held*, by MIDDLETON, J., allowing the appeal and ordering the plaintiff company to give security for costs, that, although the onus is upon the defendant under the statute to establish the negative, his statement on oath that he has made inquiry and found no property is sufficient to shift the onus, and the plaintiff, who has the knowledge, cannot complain if, in the absence of evidence to displace the *prima facie* case, it is found that his insolvency has been shewn.—The order made by MIDDLETON, J., provided that, in default of the security being given within a limited time, the action should be dismissed with costs.—Upon an application by the plaintiff company, under Rule 507, for leave to appeal from that order, it was *held* by MEREDITH, C.J.C.P., that there was good reason to doubt the correctness of the order, and that any leave to appeal that a Judge in Chambers had power to give should be given.—*Paladino v. Gustin* (1897), 17 P.R. 553, referred to.—The plaintiff company launched an appeal from the order of MIDDLETON, J., and it was *held*, by the Appellate Division, that that order was a substantive order for security



for costs, and that an appeal from it did not lie: sub-sec. 4 of sec. 12. *Augustine Automatic Rotary Engine Co. v. Saturday Night Limited*, 166.

### LICENSE.

See MUNICIPAL CORPORATIONS, 2, 6—WATER, 1, 2.

### LIEN.

See MECHANICS' LIENS — WOODMEN'S LIENS.

### LIFE INSURANCE.

See INSURANCE.

### LIMITATION OF ACTIONS.

*Tenants in Common — Possession by one Tenant—Stepmother of Co-tenants—Question whether Possession Held for All—Presumption — Question of Fact — Evidence—Limitations Act, R.S.O. 1914, ch. 75, sec. 5—Application for Partition—Trial of Issue — Costs.*—There is no irrebuttable presumption, in the case of parent and infant child entitled to undivided shares in land as tenants in common, that the parent in possession holds as "bailiff" in respect of the share of the child out of possession; the question for whom the possession was taken and held is always a question of fact, though ordinarily the finding should be that the possession of the parent is that of the child.—It was *held*, in this case, upon the evidence, in an issue tried between the parties, that the plaintiff therein, the stepmother of the defendants, had acquired, under the provisions of the Limitations Act, title to the rights and interests

of the defendants, by length of possession—her possession being for herself, and not as their bailiff.—A motion for partition, made by the stepchildren, out of which the issue arose, was dismissed with costs. No costs of the trial of the issue were allowed, because the trial was unnecessary, there being no material question of fact really in dispute. *Fry and Moore v. Speare*, 632.

See EXECUTION — EXECUTORS AND ADMINISTRATORS, 1 — RAILWAY, 5—WATER, 3.

### LIQUIDATOR.

See BANKS AND BANKING, 2.

### LIQUOR LICENSE ACT.

*Keeping Intoxicating Liquor for Sale—Magistrate's Conviction — Motion to Quash — Evidence—Inference — "Liquor" — "Beer"—R.S.O. 1914, ch. 215, sec. 2 (i)—Judicial Knowledge.*—Upon a motion to quash a magistrate's conviction of the defendant for keeping intoxicating liquor for sale, contrary to the Liquor License Act, R.S.O. 1914, ch. 215, it appeared that there was evidence from which the magistrate could infer that liquor was kept for sale upon the defendant's premises; and it was *held*, that the finding of the magistrate could not be reviewed. — Under sec. 2 (i) of the Act it is not necessary to shew that the liquor sold or kept for sale was intoxicating if it is shewn that it was a spirituous or malt liquor—and beer, which was the liquor found to have been kept for sale in this case, is both a spirituous and a malt liquor.—There is such a

thing as judicial knowledge; and a Judge may inform himself from dictionaries.—*Attorney-General v. Cast-Plate Glass Co.* (1792), 1 Anst. 39, 44, applied. *Rex v. Scaymetti*, 373.

See MUNICIPAL CORPORATIONS, 7, 8, 9.

### LIS PENDENS.

*Motion to Vacate Registry of Certificate—Husband and Wife—Separation Agreement—Conveyance of Land to Wife—Resumption of Cohabitation—Action for Declaration that Conveyance Annulled—Speedy Trial—Undertaking.*]—A motion to vacate the registry of a certificate of *lis pendens* should not succeed unless it clearly appears that the bringing of the action is an abuse of the process of the Court.—*Jamesson v. Lang* (1878), 7 P.R. 404, and *Sheppard v. Kennedy* (1884), 10 P.R. 242, followed.—The conditions of a separation deed may or may not come to an end in the event of the reconciliation of the husband and wife—that depends upon their intention.—Where the plaintiff and defendant, being husband and wife, entered into an agreement for separation, pursuant to which, *inter alia*, land was conveyed by the former to the latter, and this action was brought, after cohabitation had been resumed, to obtain a declaration that the land was still the husband's, and a certificate of *lis pendens* issued and registered, a motion to vacate the registry was refused, upon the plaintiff undertaking to speed the

trial of the action. *Bowers v. Bowers*, 463.

### LOCAL OPTION.

See MUNICIPAL CORPORATIONS, 7, 8, 9.

### MARRIAGE.

See CONSTITUTIONAL LAW, 1.

### MASTER AND SERVANT.

1. *Injury to Servant—Workmen's Compensation Act*, 4 Geo. V. ch. 25 (O.)—*Remedy—Application to Workmen's Compensation Board—Action—Jurisdiction of Supreme Court of Ontario—Sec. 15, Amended by sec. 8 of 5 Geo. V. ch. 24—Contributory Negligence—Secs. 107, 108—Jury—Judge's Charge.*]—The plaintiff, who was injured upon the business premises of his employer, on the 23rd January, 1915, which was after the coming into force of the Workmen's Compensation Act, 4 Geo. V. ch. 25 (O.), brought an action against his employer to recover damages for his injuries; and it was held, that he had a right of action, his remedy not being confined to an application to the Workmen's Compensation Board, under the Act.—Section 15 of the Act, as amended by sec. 8 of 5 Geo. V. ch. 24, does not take away from the Supreme Court the power to determine the question of the plaintiff's right to compensation under Part I. of the Act.—Sections 69, 105, 106, 107, 108, 109, and class 36 of schedule 1 of the Act, considered.—Under sec. 107, contributory negligence on the part of a workman is not a bar to recovery; but (sec. 108) con-

tributory negligence is to be taken into account in assessing the damages.—The question of contributory negligence was submitted to the jury, and they found contributory negligence; it should be assumed that they took that into account in assessing the damages, as they were told to do by the trial Judge in his charge.—Upon the findings of the jury, judgment was given for the plaintiff. *Garment v. Charles Austin Co. Limited*, 417.

2. *Liability of Master for Negligence of Servant—Driver of Hired Vehicle—Servant of Owner or Hirer—Evidence.*—The defendants hired a horse and waggon from a liveryman, who also supplied a driver. This driver was to some extent under the control of the defendants' foreman, who sat beside him while he was driving, and directed him where and when to stop and go on; the driver also assisted in the work the defendants were doing for which they used the horse and waggon, and in that was under the orders of the foreman; but the driver was the servant of the liveryman and was paid by him; and, as the liveryman testified, the defendants or their foreman had nothing to do with the actual driving of the horse. The plaintiff suffered damage by reason of the reckless driving of the horse by this driver during the period of hiring by the defendants.—*Held*, that the defendants were not liable.—*Consolidated Plate Glass Co. of Canada v. Caston* (1899), 29 S.C.R. 624, followed.

*Balfour v. Bell Telephone Co. of Canada*, 149.

See MINES AND MINERALS — NEGLIGENCE.

### MASTER IN CHAMBERS.

See LIBEL.

### MECHANICS' LIENS.

1. *Lien of Sub-contractor—Estoppel by Conduct — Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 6 — "Abandonment"—Sec. 22 (1).*—Section 6 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, provides that, unless he signs an express agreement to the contrary, any person (as described) shall have a lien:—*Held*, that a person cannot by his conduct estop himself from claiming a lien—an estoppel in pais cannot do what the section declares only a signed agreement can do.—Section 22 (1) provides that a claim for lien by a contractor or sub-contractor may be registered within 30 days after the completion or abandonment of the contract:—*Held*, that where a sub-contractor left the work under the belief that the contract was completed, but afterwards, on it being decided that he was wrong, went on and finished his work, the registration of his claim of lien within 30 days from the day upon which he so finished it, was in time—the first cessation of work was not an "abandonment" within the meaning of sec. 22. *Anderson v. Fort William Commercial Chambers Limited*, 567.

2. *Material-men — Claim of — Registration — Time — Extent of Lien—Amount “Justly Owing” by Owner to Contractor—Sum Payable to Contractor—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 6, 10—Construction of Building Contract — Price Payable in Allotted Portions — Entire Completion of Work not a Condition Precedent to Payment — Deduction by Reason of Non-completion of whole Contract.]—*

(1) *Held*, upon the evidence, that the claimants' lien for material supplied to the contractor for a building was registered in time and was established, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.—

(2) That, under the Act, secs. 6 and 10, the rights of lien-holders are measured by the amount “justly owing” by the owner to the contractor, and the owner is not liable for a greater sum than is payable to the contractor.—

(3) That the contract did not make entire completion a condition precedent to payment, but expressly divided the contract price into five sums, one of which had become “payable” under the terms of the contract. The amount payable or justly due was, *prima facie*, \$200—subject to any deduction which the owner could establish by reason of the non-completion of the whole contract—for it contemplated entire performance, although providing for payment in advance of the time of completion.—*Terry v. Duntze* (1795), 2 H. Bl. 389, applied.—*Sherlock v. Powell* (1899), 26 A.R. 407, distinguished and head-note cor-

rected. *Deldo v. Gough Sellers Investments Limited*, 274.

3. *Material-men — Conditional Sale of Materials to Contractor — Materials Affixed to Land—Right of Vendors to Rank as Lienholders — Conditional Sales Act, R.S.O. 1914, ch. 136, sec. 9—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 16 — Claim of Contractor — Extras — Finding of Fact—Appeal.]—*

Where the claimants of a lien upon land for materials supplied for the erection of a building, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, insist upon the terms of a conditional sale contract whereby they have a lien upon the materials until payment, they cannot rank as lien-holders and compete with others who have no right as against the materials.

—The provisions of sec. 9 of the Conditional Sales Act, R.S.O. 1914, ch. 136, contrasted with the provisions of sec. 16, sub-sec. 2, of the Mechanics and Wage-Earners Lien Act.—The finding of an Official Referee disallowing the claim of lien of material-men was affirmed.—The finding of the Referee that certain work done by the contractor, for which he claimed extra payment, was included in the contract price, was also affirmed. *Hill v. Storey*, 489.

4. *Material-men—Date of Last Delivery of Material—Conflicting Evidence—Finding of Master — Appeal—Time for Registration—Material Delivered on Owners' Premises to be Used in Building—Absence of Evidence to Shew Actual Use—Mechanics and Wage-*

*Earners Lien Act, R.S.O. 1914, ch. 140, secs. 6, 22.*]—Where the last delivery of material was on the 21st September, 1914, and the registration of the claim of lien was on the 21st October, 1914, within the 30 days prescribed by the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 22:—*Held*, that, although there was no evidence that the material last delivered was ever used in the construction of the building, it was sufficient that that material was delivered for the purpose of being used in the building: it was material “placed or furnished to be used,” within the meaning of sec. 6.—*Brooks-Sanford Co. v. Theodore Telier Construction Co.* (1910), 22 O.L.R. 176, considered and distinguished.—*Bunting v. Bell* (1876), 23 Gr. 584, overruled.—*Dictum* of MACMAHON, J., in *Larkin v. Larkin* (1900), 32 O.R. 80, at p. 98, approved. *Kalbfleisch v. Hurley*, 268.

5. “Owner” — Contract—“Request” to Build—*Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 2 (c)*—*Personal Liability — Evidence.*]—The defendant T., having a lease of land, sublet it to the defendant H., the latter agreeing to build upon the land according to plans to be approved by T.; and H. entered into a contract with the plaintiff to build accordingly:—*Held*, that the taking from H. of an agreement to build was a “request” from T., within the meaning of sec. 2 (c) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140; and that the

interest of T. as “owner” was subject to the lien of the plaintiff under the Act.—*Held*, also, that, although H. was not personally liable to the plaintiff under the contract between them, he had, upon the evidence, made himself liable for certain work done by the plaintiff by personally giving an order for such work. *Orr v. Robertson*, 147.

6. “Owner” — Purchaser of Land—*Claim against—Absence of Privity—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, secs. 2 (c), 6, 8—Remedy against Mortgagee—Sale of Mortgages—Mortgagee as Owner—Increase in Selling Value of Land—Evidence — Priority.*]—The lien given by sec. 6 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, attaches to the estate or interest of the owner, as “owner” is defined by sec. 2 (c); and in this case it was *held*, that the defendant B., the purchaser from the defendant S. of land upon which S. was erecting houses, was not personally liable as “owner” for work done and materials supplied by a company, the claimant of a lien, in and for the building of the houses—some of the work having been done and some of the materials supplied after B. took possession, but the company having had no communication, direct or indirect, with him in regard to work or material; what the company did was not done at B.’s request, express or implied, nor upon his credit, nor on his behalf, nor with his privity or consent, nor for his direct

benefit.—*Orr v. Robertson* (1915), 34 O.L.R. 147, distinguished.—*Held*, also, that the defendant H., the mortgagee, did not, in the circumstances of the case, come within the definition of owner; and, there being no evidence that the selling value of the land incumbered by her mortgages was increased by the work and materials of the aforesaid company, its lien did not attach under sec. 8 of the Act, upon such increased value, in priority to her interest.—*Held*, also, that, in any case, the Act did not authorise a direction that the mortgages should be sold for the purpose of realising the company's lien. *Cut-Rate Plate Glass Co. v. Solodinski*, 604.

#### MINES AND MINERALS.

*Injury to Miner—Explosion of Charge in Drilled Hole Left Unexploded—Statutory Duty of Mine-owner—Mining Act of Ontario, R.S.O. 1914, ch. 32, sec. 164, rules 14, 15, 40, 98—Neglect to Report Missing Hole—Master and Servant—Defective System—Evidence—Trial—Refusal of Adjournment—Discretion—Expert Testimony—Cause of Injury—Contributory Negligence—Damages.*]—In the defendants' mine two shifts of men were employed, one by day and one by night. There was no foreman or overseer or other person in charge to whom the report called for by rule 14 of sec. 164 of the Mining Act of Ontario, R.S.O. 1914, ch. 32, in the case of an unexploded hole, could be made. A black-board upon which to write such

a report had been provided, but no chalk. When the night shift left the mine on a Saturday night at 12 o'clock, they left unexploded one hole that had been charged with dynamite. They made no report to any one. The plaintiff, without having received any warning, went to work in the mine on the following Monday, and, while engaged in his ordinary work, struck a protruding ledge of rock—an explosion followed, and he was injured.—*Held*, that the failure of the defendants to observe the statutory rules (14, 15, 40, and 98 of sec. 164) was negligence, and was the cause of the plaintiff's injuries.—(2) That the Judge at the trial exercised a proper discretion in refusing to adjourn the trial in order to enable the defendants to obtain the evidence of experts as to the action of dynamite.—(3) That there was no evidence of negligence on the plaintiff's part.—(4) That \$5,200 damages was not excessive. *Doyle v. Foley-O'Brien Limited*, 42.

#### MISCONDUCT.

See RAILWAY, 4.

#### MISFEASANCE.

See COMPANY, 2.

#### MISTAKE.

See ARBITRATION AND AWARD.

#### MONOPOLY.

See MUNICIPAL CORPORATIONS, 2.

#### MORTGAGE.

*Conveyance of Land Subject to*

—*Obligation of Grantee to Assume and Pay—Consideration — Exchange of Lands — Vendor and Purchaser—Equitable Obligation of Purchaser — Conveyance not Made to Actual Purchaser—Parol Evidence to Shew Nature of Transaction — Admissibility — Conditional Sale.*—In this Province, the equitable obligation of the purchaser to indemnify the vendor when the amount of the mortgage is deducted from the purchase-price, and is in that sense retained by the purchaser, is recognised; but the obligation arises only when the purchaser is actually one in fact.—*Corby v. Gray* (1887), 15 O.R. 1, and *Walker v. Dickson* (1892), 20 A.R. 96, followed.—*Small v. Thompson* (1897), 28 S.C.R. 219, explained and distinguished.—In the mention in a conveyance of land of mortgages as “part of the consideration,” the reference was held to be to an exchange of lands; parol evidence was properly admitted to explain the circumstances and the extent and nature of the transaction called “an exchange of lands”—in an action brought by the grantor against the grantee to compel the latter to discharge the liability of the grantor under the mortgages; and, it being shewn by the evidence so admitted that the deed was made to the defendant, not as a purchaser, but as the nominee of P., the real owner of the land exchanged for the land conveyed by the plaintiff, and that the mortgages were, by virtue of the agreement between P. and the plaintiff, to be assumed by P. as part of the con-

sideration for the exchange, the action failed; *MAGEE, J.A.*, dissenting. *Campbell v. Douglas*, 580.

See CHURCH — MECHANICS' LIENS, 6—RECEIVER, 2.

### MUNICIPAL CORPORATIONS.

1. *Annexation of Part of Township to Village—Order of Ontario Railway and Municipal Board—Postponement of Time for Taking Effect—Erection of Village, including Annexed Territory, into Town—Jurisdiction of Board—Misrecital of Statute—Assessment of Residents of Annexed Territory by Town Council without Representation — Supplementary Assessment—By-laws—Bona Fides—De Facto Council—Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, secs. 39 (1), 47, 48—Municipal Act, R.S.O. 1914, ch. 192, secs. 17, 20, 230 — Liability for Taxes — Laches.*—See *Bell v. Town of Burlington*, 410, 619.

2. *By-law Limiting Pool-room Licenses in Town to one — Monopoly — Municipal Act, R.S.O. 1914, ch. 192, sec. 254 — Effect of secs. 249, 250 — Discretion—Motion to Quash—Refusal.*—A by-law passed by the council of a town of about 4,000 inhabitants, declaring that only one billiard and pool-room license should be issued for a certain license-year, is not obnoxious to sec. 254 of the Municipal Act, R.S.O. 1914, ch. 192, providing against the creation of monopolies; and, it not being pretended that one license was not sufficient for the

requirements of the town, or that the by-law was not passed in good faith, an application to quash it was refused—the large discretionary powers conferred by secs. 249 (2) and 250 of the Municipal Act being invoked.—*Re McCracken and United Townships of Sherborne et al.* (1911), 23 O.L.R. 81, distinguished. *Re Stewart and Town of St. Mary's*, 183.

3. *Claim against for Loss of Sheep—Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, sec. 18—Application to Council—Refusal—Enforcement by Action—Division Court—Prohibition.*]—By sec. 18 of the Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, a right of relief is given to sheep-owners, whose sheep have been killed or injured by any dog, on an application satisfactory to the council; but nothing in the Act or otherwise makes the municipal corporation liable in a court of law for the amount of the damage done.—A Division Court was prohibited from entertaining an action to recover from a township corporation the value of sheep alleged to have been killed, in the township, by dogs of unknown owners. *Re Hogan v. Township of Tudor*, 571.

4. *Drainage — Injuring Liability—Drainage Scheme—Cost in Excess of Benefit—Report of Engineer—Appeal to Drainage Referee—Municipal Drainage Act, R.S.O. 1914, ch. 198.*]—The Municipal Drainage Act (now R.S.O. 1914, ch. 198) cannot be

invoked to justify a drainage scheme upon which money is to be thrown away. Where a drainage scheme cannot be carried out except at a cost in excess of the benefit, the work should not be proceeded with; and the Drainage Referee has jurisdiction to prevent such work being proceeded with, where there is an appeal to him, under sec. 67, from the report of an engineer.—*Gosfield South v. Mersea* (1895), 1 Clarke & Scully's Drainage Cases 268, a decision of the Drainage Referee, approved.—*Re Township of Orford and Township of Aldborough* (1912), 27 O.L.R. 107, and *Re Township of Huntley and Township of March* (1909), 1 O.W.N. 190, 14 O.W.R. 1033, distinguished. *Re Township of Colchester North and Township of Anderdon, Re Township of Gosfield North and Township of Anderdon*, 437.

5. *Expropriation of Land by Public Parks Board—Arbitration as to Amount of Compensation—Award — Appeal — Interest — Costs—Possession—Public Parks Act, R.S.O. 1914, ch. 203, sec. 17—Municipal Act, R.S.O. 1914, ch. 192, secs. 344, 347.*]—The effect of sec. 347 of the Municipal Act, R.S.O. 1914, ch. 192, incorporated in the Public Parks Act, R.S.O. 1914, ch. 203, by sec. 17 of that Act, is, that where the arbitration is only as to the amount of compensation, and the expropriating by-law does not authorise permanent entry on the land, the award as to amount does not become binding on the expropriating body—the Public



Parks Board—unless adopted by by-law within three months after the making of the award; and where possession of the land has not been taken by the Board, and no provision is made in the by-law for entry upon the land under the award, interest should not be allowed to the claimant land-owner upon the sum awarded for the value of the land.—*Re Macpherson and City of Toronto* (1895), 26 O.R. 558, distinguished.—Section 344 of the Municipal Act—also incorporated in the Public Parks Act—enables the arbitrators to award costs as a fixed sum or on the scale of the Courts. Under this, the arbitrators have a discretion which they can exercise by disallowing costs.—An appeal by the claimants from an award of \$1,400 without interest and without costs was dismissed. *Re Hislop and Stratford Park Board*, 97.

6. *Hawkers and Pedlars' By-law of County—Magistrate's Conviction—Sale of Coal Oil by Travelling Salesman—Sale without Delivery — "Hawker" — Municipal Act, R.S.O. 1914, ch. 192, sec. 416—Amendment by 5 Geo. V. ch. 34, secs. 32, 33.*—To constitute an offence against a by-law of a municipality providing for the licensing, regulating, and governing of hawkers, pedlars, and petty chapmen, passed pursuant to the provision of the Municipal Act, 1903, now found in sec. 416 of the Municipal Act, R.S.O. 1914, ch. 192, and amended pursuant to the statutory amendments made by 5 Geo. V. ch. 34, secs. 32 and 33,

it is not necessary that there should be a delivery, as well as a sale, of goods by the accused; and a travelling salesman making sales of coal oil by sample is a "hawker," although he does not cry his goods or carry a pack.—Where there was, clearly and expressly, a sale, plainly evidenced in writing over the signatures of the buyer and the seller's salesman, a motion to quash a magistrate's conviction for an offence against a municipal by-law such as above described, was refused.—*Rex v. St. Pierre* (1902), 4 O.L.R. 76, and *Rex v. Borror* (1915), 9 O.W.N. 64, distinguished. *Re Garnham's Conviction, Re Richardson's Conviction*, 545.

7. *Local Option By-law — Motion to Quash — Discretion — Liquor License Act, R.S.O. 1914, ch. 215, sec. 139—Voting on By-law — Irregularities — Curative Clause of Municipal Act, R.S.O. 1914, ch. 192, sec. 150 — "Did not Affect the Result"—Onus—Voters' List—Use of Certified instead of Special List—Effect of — Voters' Lists Act, R.S.O. 1914, ch. 6, sec. 24—Municipal Act, sec. 266 — Voters Disqualified as Non-resident—Effect on Result—Failure to Shew—Departure from Principles Laid down in Act—Omission of Description of Voter—Residence in Municipality — Premature Third Reading of By-law—Subsequent Reading — Meeting of Council—Petition for By-law.*—A motion to quash a local option by-law was dismissed by HODGINS, J.A., and upon appeal his order was affirmed. Many objec-

tions to the validity of the by-law were dealt with, and the effect of curative legislation was considered, special reference being made to the statutory provisions named in the head-lines.

—*Re Ryan and Town of Alliston* (1910), 21 O.L.R. 582, 22 O.L.R. 200, and *Re Sinclair and Town of Owen Sound* (1906), 13 O.L.R. 447, applied, in regard to an objection that the voters' list used in the voting upon the by-law was not that required by law; and *Re Schumacher and Town of Chesley* (1910), 21 O.L.R. 522, and *Re Ellis and Town of Renfrew* (1910-11), 21 O.L.R. 74, 23 O.L.R. 427, followed in respect of an objection to the want of description of a voter whose name is on the list. *Re Sharp and Village of Holland Landing*, 186.

8. *Local Option By-law — Motion to Quash—Irregularity in Service of Notice of Motion — Failure to File Affidavits before Service—Rule 298 — Municipal Act, R.S.O. 1914, ch. 192, sec. 286 — Solicitor's Slip—Relief against —Rule 184.*]—A notice of a motion to quash a by-law of the 16th February, 1914, was served on the 13th February, 1915; the affidavits in support of it were not filed before the service of the notice of motion, as required by Rule 298, but were filed on the 20th February, when the motion was set down for hearing. Copies of the affidavits were demanded, affidavits in answer were filed, and cross-examination upon the affidavits took place. It was contended that the motion should be dismissed, because the affidavits

were not filed in time, and because the application was not made within one year after the passing of the by-law (sec. 286 of the Municipal Act, R.S.O. 1914, ch. 192), for, although the application is "made" when the notice of motion is "served," it must be validly and regularly served:—*Held*, that the Court had power to relieve against the slip of a solicitor or his clerk, and the irregularity should be ignored: Rule 184.—*Devlin v. Devlin* (1871), 3 Ch. Chrs. 491, and *Re Backhouse v. Bright* (1889), 13 P.R. 117, followed. *Re Arthur and Town of Meaford* 231.

9. *Local Option By-law — Motion to Quash—Similar By-law Submitted to Electors in Previous Year and not Approved—Liquor License Act, R.S.O. 1914, ch. 215, sec. 137 (6)—Consent Judgment Declaring Submission a Nullity—Diversity of Judicial Opinion—Motion Referred to a Divisional Court—Judicature Act, R.S.O. 1914, ch. 56, sec. 32—Discretion.*]—In 1913, a local option by-law was submitted to the electorate of a town; the vote in favour of it was not sufficient to permit of its being passed. An action was then brought (*Overholt v. Town of Meaford*) and a consent judgment pronounced declaring that the submission of that by-law was a nullity, and permitting a by-law to be submitted to the electorate in 1914, notwithstanding the provision of the Liquor License Act (R.S.O. 1914, ch. 215, sec. 137 (6)) prohibiting a submission of a similar by-law.

within three years — upon the theory that there were such irregularities in the submission that, if the by-law had been passed, it would have been quashed. An action brought to restrain the town corporation from submitting a by-law in 1914 was unsuccessful: *Hair v. Town of Meaford* (1914), 31 O.L.R. 124; a by-law was submitted, approved by the electors, and passed by the council on the 16th February, 1914. A motion to quash that by-law, because of the submission of the previous by-law within three years, was referred to a Divisional Court, the Judge who heard the motion being of opinion that the decision in *Overholt v. Town of Meaford* was wrong and of sufficient importance to be considered in a higher Court: Judicature Act, R.S.O. 1914, ch. 56, sec. 32. — The Divisional Court before which the motion came was of the opinion that, in the admitted circumstances of the case, its discretion should not be exercised in favour of the motion; and, without expressing any opinion as to the validity or otherwise of the by-law, dismissed the motion with costs. *Re Arthur and Town of Meaford*, 231, 421.

See ASSESSMENT AND TAXES—COMPANY, 4—HIGHWAY — RAILWAY, 5—STREET RAILWAY — WATER, 3.

#### MUNICIPAL DRAINAGE ACT.

See ARBITRATION AND AWARD—MUNICIPAL CORPORATIONS, 4.

#### NATURALISATION.

See ALIEN ENEMY, 3.

#### NAVIGABLE STREAM.

See WATER, 3.

#### NAVIGABLE WATERS' PROTECTION ACT.

See WATER, 2.

#### NAVIGATION.

See WATER, 2.

#### NEGATIVE EASEMENT.

See COVENANT.

#### NEGLIGENCE.

*Injury to Patient in Hospital—Carelessness of Attendants—Public Charitable Institution—Corporate Body—Contract with Patient—Liability—Care in Selection of Attendants—Master and Servant.*]—Damages resulting to patients from the negligence of employees may be recovered from corporate bodies in the position of the defendants, a charitable institution incorporated, but without share capital. —*Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, followed. —The plaintiff, a paying patient in the defendants' hospital, was injured by reason of the carelessness of some one in attendance upon her after an operation:—*Held*, that the contract was, that the defendants should in good faith use due care and skill in selecting the medical staff, and in employing and permitting nurses in training and other assistants to work for and attend to patients in the institution—and that was the extent of the defendants' duty and responsi-

bility; that the relationship of master and servant did not exist between the defendants and the physicians, surgeons, nurses, and other attendants assisting at the operation, whether these were paid by the defendants or not; that the defendants were not guilty of any negligence in the selection of their staff and nurses and attendants; and, therefore, the plaintiff's action to recover damages for her injuries failed.—*Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, followed. *Lavere v. Smith's Falls Public Hospital*, 216.

See HIGHWAY — MASTER AND SERVANT — MINES AND MINERALS—PRINCIPAL AND AGENT—PROMISSORY NOTE—RAILWAY, 5 — WATER, 4.

#### NEW TRIAL.

See TRIAL.

#### NEWSPAPER.

See CONTEMPT OF COURT — LIBEL.

#### NOMINAL DAMAGES.

See VENDOR AND PURCHASER.

#### NONREPAIR OF HIGHWAY.

See HIGHWAY.

#### NOTICE.

See ARBITRATION AND AWARD — HIGHWAY—PROMISSORY NOTE.

#### NOTICE OF MOTION.

See MUNICIPAL CORPORATIONS, 8.

#### NOVATION.

See STATUTE OF FRAUDS.

#### NUISANCE.

See CRIMINAL LAW, 1 — WATER, 2.

#### OBSTRUCTING PEACE OFFICER.

See CRIMINAL LAW, 5.

#### OBSTRUCTION.

See WATER, 2.

#### ONTARIO RAILWAY AND MUNICIPAL BOARD.

See APPEAL, 2, 3—ASSESSMENT AND TAXES, 1—MUNICIPAL CORPORATIONS, 1—RAILWAY, 1 — STREET RAILWAY.

#### OPTION.

See PARTNERSHIP, 2—VENDOR AND PURCHASER.

#### ORPHAN ASYLUM.

See ASSESSMENT AND TAXES, 2.

#### OVERHOLDING TENANT.

See LANDLORD AND TENANT, 2.

#### PARTIES.

See DISCOVERY — EXECUTORS AND ADMINISTRATORS, 1—RAILWAY, 5.

#### PARTITION.

See LIMITATION OF ACTIONS.

#### PARTNERSHIP.

1. *Death of Partner—Construction of Partnership Articles—Implication of Term—Right of Pre-emption of Surviving Partner — Inclusion of Goodwill as Asset — Annual Statements of Account—Right of Representatives of Deceased Partner to Share in Profits after End of Current Year.*—In the absence of an express agree-

ment, surviving partners have no right to take the share of a deceased partner at a valuation, nor have they any right of pre-emption.—The Court has no right to imply a stipulation in a written contract, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.—*Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488, 491, followed.—The goodwill of a trade, although inseparable from the business, is an appreciable part of the assets of a concern; a share of it belongs to the estate of the deceased partner; and it is saleable and divisible on dissolution or on the death of a partner.—*Wedderburn v. Wedderburn* (1855), 22 Beav. 84, and *Hibben v. Collister* (1900), 30 S.C.R. 459, followed.—Upon the proper construction of the articles of partnership before the Court, a provision permitting the surviving partner to take over the interest of the deceased partner, upon a proper payment, was not to be implied, and there was no right of pre-emption in the surviving partner.—The goodwill formed part of the ordinary assets of the firm.—The annual statements of account and the valuation therein placed upon the assets should be regarded as merely conventional in their nature, and upon the final winding-up should be disregarded.—The representatives of the deceased partner were not entitled to any share of the profits accruing between the end

of the then current year and the period fixed for the final winding-up. *Re Wood Vallance & Co.*, 278.

2. *Syndicate Formed to Buy Specific Land at Specific Price—Option Held by Member at Lower Price—Absence of Fraud—Right of Member to Payment of Price Agreed upon—Member of Syndicate Named as “Manager” — Payment for Services—Ratification by Majority of Members — Rights of Dissatisfied Minority — Provisions of Partnership Articles.*—Upon an accounting by a trustee for a syndicate formed to buy a specific tract of land at a specific price and sell in lots, in an action brought by dissatisfied members of the syndicate, after sales had been made and large profits realised, it was held, that the syndicate or partnership was properly charged with the specific price agreed upon, which had been paid to K., a member, or his wife, by the trustee: there was no duty on the part of K. to exercise a certain option for the benefit of the syndicate, or to obtain the land at a lower price than that agreed upon.—*Gluckstein v. Barnes*, [1900] A.C. 240, and *Bentley v. Craven* (1853), 18 Beav. 75, distinguished.—The contract of partnership excludes any implied contract for payment for services rendered the firm by any of its members; and in this respect the managing partner or “manager” stands in no different position from any other partner; and the trustee, in accounting, was not allowed for sums paid to a member of the

syndicate named in the syndicate articles as "manager;" he was not entitled to charge the partnership with the benefit it had derived from his services or the amount he might have had to pay another for such services.—By the syndicate agreement, the manager was given power to "convene meetings of the syndicate to deliberate and decide on any of the affairs of the syndicate . . . the majority of the votes to decide:"—*Held*, that this did not justify such a meeting (by a majority) giving away the funds of the syndicate to one of its members; and an alleged ratification of the payments to the manager was not binding upon the syndicate. *Merriam v. Kenderdine Realty Co.* (No. 1), 556.

See RECEIVER, 1.

#### PAYMENT INTO COURT.

See EXECUTORS AND ADMINISTRATORS, 2.

#### PLANS.

See STREET RAILWAY.

#### POLICE MAGISTRATE.

See CRIMINAL LAW, 5, 6.

#### POWER OF APPOINTMENT.

See WILL, 3.

#### POWER OF SALE.

See TRUSTS AND TRUSTEES.

#### PRACTICE.

*County Courts — Writ of Summons — Special Endorsement—Affidavit of Merits Filed with Appearance—Election of Plaintiff to Treat as Record—*

*Day Set for Trial — Order of Junior Judge Allowing Delivery of Statement of Defence — Delivery of Counterclaim as well — Order of Senior Judge Setting aside — Determination that Pleadings Unnecessary — Appeal — Final Order — County Courts Act, sec. 40 (2).]*—In an action in a County Court, commenced by a specially endorsed writ of summons, the defendant appeared and filed a sufficient affidavit of merits under Rule 56. The plaintiffs elected, under Rule 56 (2), to treat the endorsed claim and the affidavit as the record, applied to the Senior Judge of the County Court to set a day for trial, obtained from him an appointment for a certain day, and served notice of trial for that day, under Rule 56 (2). Three days later, and before the day set for trial, the defendant applied *ex parte* to the Junior Judge, and obtained an order authorising the delivery of a statement of defence, under Rule 56 (5). The defendant then delivered a statement of defence and counterclaim; and the Senior Judge, on the application of the plaintiffs, made an order setting aside the order of the Junior Judge and the pleading delivered by the defendant:—*Held*, on appeal, that the order of the Senior Judge was not supportable on the ground that the defendant's application was made to the Junior instead of the Senior Judge,

nor on the ground that the Senior Judge was seized of the case, having made an order for its trial before himself: the order of the Junior Judge was not irregular or improper unless because it was made *ex parte*.—But, as Rule 56 (5) authorises the granting of leave to deliver a statement of defence only when it sets up a further or other answer to the plaintiff's claim than that contained in the affidavit, the order of the Senior Judge was right; for, upon the record as it stood before the delivery of the statement of defence, the defendant might prove all that he alleged in the statement of defence.—*Held*, also (HODGINS, J.A., *dubitante*), that "statement of defence" in Rule 56 (5) does not include a counterclaim; and the counterclaim was properly set aside.—*Held*, also, that the order of the Senior Judge was final in its nature, and the appeal lay: County Courts Act, R.S.O. 1914, ch. 59, sec. 40 (2).—*Smith v. Traders Bank* (1905), 11 O.L.R. 24, and *M. Brennen & Sons Manufacturing Co. Limited v. Thompson* (1915), 33 O.L.R. 465, followed.—*Per* HODGINS, J.A.:—The order of the Junior Judge, having been made *ex parte*, could not be supported and was properly set aside.—*Joss v. Fairgrieve* (1914), 32 O.L.R. 117, followed. *Davis Acetylene Gas Co. v. Morrison*, 155.

See ALIEN ENEMY—APPEAL

—ARREST—CONTEMPT OF COURT  
—COSTS — DISCOVERY — DIVISION COURTS—EVIDENCE—EXECUTION — EXECUTORS AND ADMINISTRATORS, 1—LIBEL — LIES  
PENDENS—MUNICIPAL CORPORATIONS, 8 — RAILWAY, 4 — RECEIVER—TRIAL.

#### PRE-EMPTION.

See PARTNERSHIP, 1.

#### PREFERENTIAL CLAIM.

See COMPANY, 4.

#### PRESUMPTION.

See INSURANCE, 1—LANDLORD AND TENANT, 2—LIMITATION OF ACTIONS.

#### PRINCIPAL AND AGENT.

*Claim for Commission on Sale of Land—Failure to Establish Agency — Authority of Solicitor for Vendors — Sale-agreement Signed by Vendors—Insertion of Name of Agent and Promise to Pay Commission without Knowledge of Vendors — Negligence — Liability—Recognition of Agent.*]—The defendants, having land for sale, mentioned it to their solicitor, and were willing to pay him a commission if he effected a sale. They did not give him authority to employ a land agent. The solicitor drew up a sale-agreement between the defendants and an intending purchaser, and inserted in it the name of the plaintiff as the agent who had effected the sale for the defendants, and a promise on the part of the defendants to pay the plaintiff a commission. The

document was not read over or explained to the defendants; they supposed it to be no more than a sale-agreement. They signed it, not knowing that the plaintiff's name or the promise was there, having no reason to suspect it, and without having had their attention directed to it by the solicitor. They knew nothing of the plaintiff nor of any agent other than the solicitor. There was evidence that the plaintiff was to give the solicitor a share of the commission:—*Held*, that there was no negligence on the part of the defendants—if that was material—and that they were not, in the circumstances, bound by the written recognition and promise.—*Foster v. Mackinnon* (1869), L.R. 4 C.P. 704, *Lewis v. Clay* (1897), 67 L.J.Q.B. 224, and *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489, followed. *Rose v. Mahoney*, 238.

#### PRINCIPAL AND SURETY.

See GUARANTY—STATUTE OF FRAUDS.

#### PRIVY COUNCIL.

See APPEAL, 2, 3.

#### PROFITS.

See PARTNERSHIP, 1—SALE OF GOODS, 2—TRUSTS AND TRUSTEES.

#### PROHIBITION.

See CRIMINAL LAW, 6—DIVISION COURTS, 2 — MUNICIPAL CORPORATIONS, 3.

#### PROMISSORY NOTE.

*Action by Endorsee against Maker — Defence — Agreement Evidenced by Correspondence — Sale of Goods—Renewal of Note Given for Price—Continuance of Renewals while Goods Unsold—"Bankable Paper"—Transfer of Note—Evidence of Value—Defect in Title—Notice—Neglect to Make Inquiries—Holder in Due Course.*—The defendant company, a dealer in machinery in Ontario, by correspondence with the B. company, a manufacturer in Illinois, made an arrangement by which some heaters of the B. company were sent to the defendant company in July, 1907, and a promissory note at 4 months given by the defendant company for the price. The note was marked "renewable," and was renewed many times. The last renewal was in December, 1913, at 4 months, and was for less than half the amount of the original note. During the currency of this last renewal note, it was endorsed by the B. company to one W. and by W. to the plaintiff company; and this action was brought to recover the amount of the note, it not being paid at maturity:—*Held* (MACLAREN, J.A., dissenting), that the correspondence shewed an out and out sale of the heaters to the defendant company, and an agreement that the B. company would accept for the price the defendant company's note at 4 months, and renew at maturity



for the amount of the price of the heaters then unsold.—(2) That the agreement was for one renewal only; and the fact that the note was renewed every 4 months down to the time of the giving of the note sued on did not alter or affect the agreement as evidenced by the correspondence—the terms of it being unambiguous.—*Innes v. Munro* (1847), 1 Ex. 473, applied and followed.—(3) The plaintiff company was declared to be a “holder in due course.” *J. C. Pennoyer Co. v. Williams Machinery Co. Limited*, 493.

#### **PROSPECTUS.**

See COMPANY, 1.

#### **PROVINCIAL LEGISLATURE.**

See CONSTITUTIONAL LAW — RAILWAY, 1.

#### **PUBLIC HOSPITAL.**

See NEGLIGENCE.

#### **PUBLIC NUISANCE.**

See CRIMINAL LAW, 1.

#### **PUBLIC PARKS ACT.**

See MUNICIPAL CORPORATIONS, 5.

#### **RAILWAY.**

1. “Branch Line of Railway” — *Dominion Railway Act*, 1888, 51 Vict. ch. 29, sec. 306—Construction — *Provincial Railway Crossing Dominion Railway — Work for the General Advantage of Canada — Legislative Authority — Jurisdiction of Ontario Railway and Municipal Board.*]—By sec. 306 of the *Dominion Railway Act* of 1888,

51 Vict. ch. 29, certain named railways were declared to be works for the general advantage of Canada; “and,” the section continued, “each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada:”—*Held*, that the word “branch,” which qualifies the word “line,” in the part of the section quoted, also qualifies the word “railway” which immediately follows; and, therefore, sec. 306 affects only the named railways and their branch lines.—The *Hamilton Grimsby and Beamsville Railway*, an electric railway which now crosses one of the railways named in sec. 306, has not, therefore, come under the legislative authority of the Parliament of Canada, but is subject to the legislative authority of the Legislature of Ontario, by which the company was incorporated, and to the authority of the Ontario Railway and Municipal Board.—Sections 3, 4, 6A (added by sec. 1 of 63 & 64 Vict. ch. 23), 173, 177, 306, and 307 of 51 Vict. ch. 29, considered. *Re Ross and Hamilton Grimsby and Beamsville R.W. Co.*, 599.

2. *Expropriation of Land — Compensation—Arbitration and Award — “Special Value” of Land for Business Carried on—Business Disturbance—“Special Adaptability” — Elements of Damage.*]—Arbitrators, in fix-

ing the amount to be paid as compensation to land-owners for land expropriated by a railway company for the purposes of their railway, under the Dominion Railway Act, allowed \$20,000 "for the extra cost of harvesting ice in any other place in the city of B., or what may be termed 'special adaptability interest' in the land expropriated:"—*Held*, that the \$20,000 represented the special value of the lands expropriated and damages for disturbance to business; and, as the matters dealt with by the arbitrators were proper to be considered, and there was no discoverable error in principle, the award should stand, although the arbitrators' method of calculation might not be the most usual or best to be adopted.—*Semble*, that the better method was to arrive at the value of the land, including in that the element of fitness for the business carried on upon it, and then to allow for disturbance.—"Special value" refers to the present use of land, and means its added worth to the owners for the actual and particular use to which it is being put, and for which it is specially fit; while "special or exceptional adaptability" refers to an apparent but future use to which the property may be, but is not now, put, and for which it is particularly adapted.—*Pastoral Finance Association Limited v. The Minister*, [1914] A. C. 1083, applied. *Re Schooley*

*and Lake Erie and Northern R.W. Co.*, 328.

3. *Expropriation of Land — Dominion Railway Act—Award — Compensation — Method of Estimating—Value of Land Remaining after Expropriation—Offer to Reconvey Part Taken —Increase in Commercial Value —Potentialities and Contingencies.*]—In ascertaining the compensation to be made by a railway company in respect of land taken for the railway, under the Dominion Railway Act, R.S.C. 1906, ch. 37, the proper method is to ascertain the value of the whole parcel of which part has been taken and the value of the remaining portion after the taking and deduct one from the other—the difference is the compensation to be allowed.—*James v. Ontario and Quebec R.W. Co.* (1886-8), 12 O.R. 624, 15 A.R. 1, followed.—In estimating the value of land, it is the pecuniary or commercial value that must be considered; in determining that value all potentialities and contingencies must be taken into account; and that applies to the determination of the value after as well as before the expropriation.—*Re Macpherson and City of Toronto* (1895), 26 O.R. 558, 565, and *In re Cavanagh and Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, 6 Can. Ry. Cas. 395, approved and applied.—In estimating the value of the land left after the taking, the fact that if a reconveyance by the rail-

way company of the property taken were accepted by the owner the land would be increased in value, must be taken into account. *Re Hannah and Campbellford Lake Ontario and Western R.W. Co.*, 615.

4. *Expropriation of Land — Railway Act, R.S.C. 1906, ch. 37, secs. 199, 204—Compensation—Arbitration—Award Set aside because of Mis-conduct of Arbitrators—Costs of Arbitration—Jurisdiction.*]—An award of compensation under the Railway Act, R.S.C. 1906, ch. 37, was set aside by the Court, on the ground of the misconduct of the arbitrators, upon motions made by both the company and the land-owner, but without costs, as both parties had attacked the award, and neither had attempted to support it.—It was *held*, that the Court had no jurisdiction over the costs of the proceedings before the arbitrators.—*In re Pattullo and Town of Orangeville* (1899), 31 O.R. 192, distinguished. — The company had, before the arbitration, offered a sum which the land-owner refused to accept. The company was in possession of the land; no money had been paid to the land-owner nor into Court; and, after the award was set aside, no further proceedings were taken until the company moved before a Judge for an appointment for the taxation of the costs of the arbitration:—*Held*, refusing that application, that the case did not fall

within sec. 204 of the Act, for there was an award within the time limited, and the fact that it was invalid by reason of what was done by the arbitrators did not render it a nullity so that it could be said that there never was any award.—And *held*, that sec. 199 is predicated upon the existence of a valid award, and is intended to apply where the sum awarded does not exceed the sum offered; and the compensation there referred to is the compensation fixed or determined under the Act. *Re Windatt and Georgian Bay and Seaboard R.W. Co.*, 198.

5. *Public Footway under Tracks in City — Dangerous Condition — Injury to Pedestrian — Negligence of Railway Company and City Corporation — Liability of City Corporation — Addition as Party after three Months from Time of Injury — Action Barred by Municipal Act, R.S.O. 1914, ch. 192, sec. 460 (2) — Liability of Railway Company — Railway Act, R.S.C. 1906, ch. 37, sec. 241 — Expert Witnesses — Evidence Act, R.S.O. 1914, ch. 76, sec. 10 — Damages — Costs.*] — A subway, affording passage to foot-passengers under railway tracks in a city, was out of repair and in a dangerous condition by reason of the negligence both of the railway company and the city corporation, the defendants, and injuries sustained by the plaintiff, while lawfully using the subway, were the result of that

negligence.—The action having been brought against the railway company only, and the city corporation having been added as a party at a later stage, more than three months after the date of the plaintiff's injury, the claim against the city corporation was barred by sec. 460, subsec. 2, of the Municipal Act, R.S.O. 1914, ch. 192, although the action was begun within the three months.—The railway company was liable under sec. 241 of the Railway Act, R.S.C. 1906, ch. 37.—The plaintiff had not transgressed by calling more than three expert witnesses (sec. 10 of the Evidence Act, R.S.O. 1914, ch. 76); for, although five medical men were witnesses for the plaintiff, three only were regarded as expert witnesses.—The plaintiff's damages were assessed at \$3,500.—Judgment was given for the plaintiff against the railway company with costs, including the costs incurred by the addition of the city corporation as a party, for it was reasonable and proper to add the corporation. — *Till v. Town of Oakville* (1915), 33 O.L.R. 120, and *Besterman v. British Motor Cab Co.*, [1914] 3 K.B. 181, followed.—The action as against the city corporation was dismissed without costs. *Burrows v. Grand Trunk R.W. Co.*, 142.

See ASSESSMENT AND TAXES,  
3—RECEIVER, 2—STREET RAIL-  
WAY.

### RAPE.

See CRIMINAL LAW, 7.

### RATIFICATION.

See PARTNERSHIP, 2.

### RECEIVER.

1. *Partnership — Syndicate—Trustee — Judgment Directing Payment of Moneys into Bank — Neglect to Comply with—Misunderstanding—Motion for Appointment of Receiver—Locus Pœnitentiæ — Terms.*] — The Court has power to appoint a receiver at any stage of the action and for any sufficient cause; but no ground for the appointment of a receiver which existed at the time of the trial, or at all events at the teste of the writ, could, in this case, be urged.—In partnership actions, the Court is loath to exercise the power to appoint a receiver, but in a proper case will do so.—It was admitted that the defendant trustee had failed to comply with the direction of the judgment to pay into the bank money received before the trial; but, as it appeared that the neglect was due to a misunderstanding, the defendant trustee was allowed, upon terms, an opportunity to remedy its neglect; in default of payment of the money into the bank and compliance with the terms imposed within a time fixed by the Court, the appointment of a receiver was ordered. *Merriam v. Kenderdine Realty Co.* (No. 2), 563.

2. *Railway Company—Trustee for Holders of Mortgage—*

*bonds — Passing Accounts and Fixing Remuneration of Receiver—Right of Bondholders to be Heard—Appointment of Solicitor as Representative—Lapse upon Appointment as County Court Judge — Re-opening of Accounts — Ruling of Master—Leave to Appeal from—Necessity for Certificate — Practice —Costs.]*—In May, 1912, the manager of the plaintiff company was appointed receiver on behalf of the plaintiff company, as trustees for the holders of mortgage-bonds issued by the defendant company, of all the defendant company's railways and undertakings comprised in or subject to the security created by the said bonds and the bond mortgages made by the defendant company to the plaintiff company. The receiver was also authorised to make certain payments, and was to be allowed for them in his account:—*Held*, that the plaintiff company, as mortgagees, did not, as between them and their receiver, represent the bondholders, and the latter were entitled to be heard upon the passing of the accounts and fixing the remuneration of the receiver.—The accounts of the receiver were passed by the Master in June and October, 1913, and November and December, 1914. In 1913, the bondholders were not represented, although W., who was solicitor for the defendant company, and was himself a bondholder, attended, as he said, "to represent all parties in any way interested in the

passing of the accounts and the remuneration to be allowed." In October, 1914, W. was appointed by the Master to represent bondholders, but, before the return of the appointment for the passing of the receiver's accounts, W. became a County Court Judge; and, at the actual passing of the accounts, two other solicitors, as agents for W., appeared and took part:—*Held*, that W.'s appointment to represent the bondholders must be taken to have lapsed upon his taking office as a County Court Judge; his request to other solicitors to appear for him did not cure this defect; and the bondholders were, therefore, without representation on the two occasions when the accounts were passed.—And *held*, that the reference should be re-opened and the receiver's accounts and the question of his remuneration again investigated upon notice to the bondholders.—*Held*, also, that, before moving for leave to appeal from the ruling of the Master declining to re-open, the objecting bondholders should have procured and filed his certificate of that ruling. *Trusts and Guarantee Co. Limited v. Grand Valley R.W. Co.*, 87.

#### RECLAIMED LAND.

See WATER, 3.

#### REFORMATION OF LEASE.

See LANDLORD AND TENANT, 1.

#### REGISTRY LAWS.

See MECHANICS' LIENS.

**REGULATIONS.**

See CONSTITUTIONAL LAW, 2,  
3—SCHOOLS.

**RELEASE.**

See GUARANTY, 2.

**RELIGIOUS INSTITUTIONS ACT.**

See CHURCH.

**REMAND.**

See CRIMINAL LAW, 6.

**RETROSPECTIVE LEGISLATION.**

See INSURANCE, 2.

**REVOCATION. §**

See WILL, 1.

**RIDEAU RIVER.**

See WATER, 3.

**RIPARIAN RIGHTS.**

See WATER, 2, 3.

**RIVERS AND STREAMS.**

See ASSESSMENT AND TAXES,  
3—WATER.

**ROMAN CATHOLIC SEPARATE SCHOOLS.**

See CONSTITUTIONAL LAW, 2,  
3—SCHOOLS.

**RULES.**

(Consolidated Rules of Practice,  
1913.)

Rule 56.]—See PRACTICE.

Rule 184.]—See MUNICIPAL  
CORPORATIONS, 8.

Rule 298.]—See MUNICIPAL  
CORPORATIONS, 8.

Rule 327.]—See DISCOVERY.

Rule 507.]—See LIBEL.

Rules 533 et seq.]—See EXE-  
CUTION.

**SALE OF GOODS.**

1. *Contract — Statute of Frauds—Receipt and Acceptance — Condition as to Fitness — Right to Inspect and Reject—Shipment from Distant Place—Delivery to Carrier—Inspection at Ultimate Destination — Adequate Cause for Rejection.*]—A large quantity of tinned beans were sold by the plaintiffs to the defendants, through a broker. The goods were not inspected by the defendants before or at the time of shipment, and no notice was given of the time when the goods would in fact be shipped. The goods were shipped as contemplated by the contract, and delivered to the carrier and received from the carrier and taken into the defendants' warehouse, where they were examined, and rejected:—*Held*, that there was an actual receipt and acceptance sufficient to take the case out of the Statute of Frauds.—*Page v. Morgan* (1885), 15 Q.B.D. 228, and *Taylor v. Smith*, [1893] 2 Q.B. 65, followed.—*Held*, also, that the right of inspection existed at the time the goods were examined in the warehouse—the right of inspection *primâ facie* continued till the goods arrived and were accepted at their ultimate destination. — Review of the authorities.—*Pierson v. Crooks* (1889), 115 N.Y. 539, specially referred to. *Thomson v. Dymont* (1886), 13 S.C.R. 303, distinguished.—And *held*, upon the evidence, that the goods were not of the stipulated quality nor

in accordance with the contract; that they were not merchantable as first class goods nor fit for the purpose for which they were sold; that, upon inspection, they were rejected for adequate cause; and an action for the price failed. *Thames Canning Co. v. Eckardt*, 72.

2. *Manufacture by Vendors—Refusal of Purchaser to Accept—Breach of Contract—Damages—Absence of General Market—Profits.*] — The defendant ordered from the plaintiffs certain goods of the style and kind manufactured by the plaintiffs, as described and at the price and upon the terms stated in a written order. The goods were ready for shipment on the date fixed for delivery; but the defendant, before they were shipped, assumed to cancel the order, and demanded the return of a part of the price which he had paid in cash. The goods did not leave the possession of the plaintiffs, nor did they sell or attempt to sell them:—*Held*, that the plaintiffs were entitled to be put in the same position as if the contract had been performed; and, as it did not appear that there was a general market fixing the price of goods of the kind bargained for, they should recover as damages the profits they would have made upon the sale to the defendant—ascertained by deducting from the contract price the cost of production ready for delivery.—*In re Vic Mill Limited*, [1913] 1

Ch. 183, followed. *Brunswick Balke Collender Co. of Canada Limited v. Falsetto*, 386.

3. *Warranty—Defects — Bad Workmanship — Possible Cause of Defects — Evidence — Onus — Causal Connection—Repairs*] — A manufacturing company warranted that only the best workmanship and material should be used in the construction of two boilers which they sold to a brewery company. After the boilers had been some time in use, leaks and cracks appeared in one of them and the purchasers sued for damages for breach of warranty:—*Held*, that the onus was upon the purchasers to establish not only that the lap and the caulking were excessive, but that the excess in one respect or the other caused the leaks and cracks which rendered the boiler unfit for use; that this onus had not been discharged by the purchasers; and that the finding of the trial Judge that the workmanship was not as good as it might have been, and his statement that the things of which the purchasers complained *might have been* the cause of the leaks and cracks, were not sufficient, even in the absence of proof that they resulted from some other cause, to entitle the purchasers to recover damages—there must be evidence to connect the faults in workmanship with the defects which developed in the boiler; the bare possibility was not sufficient in the ab-

sence of the exclusion of all other reasonably possible causes.—*Badcock v. Freeman* (1894), 21 A.R. 633, and *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, explained and distinguished.—*Held*, also, that the brewery company had failed to establish a claim made by them for the price of repairs to the boilers. *Grant's Spring Brewery Co. Limited v. E. Leonard & Sons Limited*, *E. Leonard & Sons Limited v. Grant's Spring Brewery Co. Limited*, 429.

See GUARANTY, 1—MUNICIPAL CORPORATIONS, 6—PROMISSORY NOTE.

### SALE OF INTOXICATING LIQUORS.

See LIQUOR LICENSE ACT.

### SALE OF LAND.

See CONTRACT, 2—PRINCIPAL AND AGENT—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER.

### SALE OF SHARES.

See CONTRACT, 4.

### SCALE OF COSTS.

See COSTS.

### SCHOOLS.

*Roman Catholic Separate School not Designated as English-French—Use of French as Language of Instruction—Regulations of Department of Education—Breach — Injunction.*—The judgment of FALCONBRIDGE, C.J.K.B., 31 O.L.R. 360, restraining the defendants from using or allowing the use of French as the language of in-

struction or communication in a Roman Catholic Separate School, so long as the same should not be permissible under the Regulations of the Department of Education, was affirmed.—The breach of the Regulations which had taken place was the teaching of French, either under clause 3 (1) or 4 of Instruction 17 of 1913, without the fulfilment of the conditions embodied in them, and in a school not designated by the Minister of Education as an English-French school. *McDonald v. Lancaster Separate School Trustees*, 346.

See CONSTITUTIONAL LAW, 2, 3.

### SEAL.

See GUARANTY, 2.

### SECURITY FOR COSTS.

See ALIEN ENEMY, 2—LIBEL.

### SEDUCTION.

See CRIMINAL LAW, 3.

### SEPARATE SCHOOLS.

See CONSTITUTIONAL LAW, 2, 3—SCHOOLS.

### SEPARATION AGREEMENT.

See LIS PENDENS.

### SERVANT.

See MASTER AND SERVANT.

### SHARES.

See COMPANY—CONTRACT, 4.

### SIDEWALK.

See HIGHWAY.

### SOLICITOR.

See CONTRACT, 1—MUNICIPAL



CORPORATIONS, 8 — PRINCIPAL  
AND AGENT—RECEIVER, 2.

**SPECIAL DAMAGE.**

See WATER, 2.

**SPECIAL ENDORSEMENT.**

See PRACTICE.

**STATED CASE.**

See CRIMINAL LAW, 7.

**STATUTE OF FRAUDS.**

*Moneys Advanced by Director of Company for Benefit of Company—Oral Promise of President of Company to Repay — Interest of President as Largest Shareholder — Evidence — Contract of Suretyship—Novation.*]—The defendant G., the holder of the bulk of the shares of the defendant company, and its president, made advances to the company to enable it to meet its liabilities. The plaintiff, who was also a shareholder, a director, and the secretary of the company, also made advances for the same purpose; and it was established that he did so upon the oral promise of G. to repay the money so advanced:—*Held*, upon the evidence, that the company was primarily the plaintiff's debtor; G.'s promise was a promise to answer for the debt of another—the company—and so the Statute of Frauds afforded a defence to the plaintiff's claim to recover from G.—G.'s contract was one of suretyship, notwithstanding his large interest; and the evidence did not justify the finding of a novation by which

the original debtor was released.—Review of the authorities. *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778, and *Davys v. Buswell*, [1913] 2 K.B. 47, specially referred to. *Brown v. Coleman Development Co.*, 210.

See CONTRACT, 2, 3—LANDLORD AND TENANT, 1—SALE OF GOODS, 1.

**STATUTE OF LIMITATIONS.**

See EXECUTION, EXECUTORS AND ADMINISTRATORS, 1—LIMITATION OF ACTIONS—RAILWAY, 5—WATER, 3.

**STATUTES.**

28 Vict. ch. 5 (C.) (Roman Catholic Separate Schools in Upper Canada.)  
See CONSTITUTIONAL LAW, 2.  
30 & 31 Vict. ch. 3, secs. 91 (26), 92 (12) (Imp.) (British North America Act.)  
See CONSTITUTIONAL LAW, 1.  
30 & 31 Vict. ch. 3, secs. 93 (1), 133.  
See CONSTITUTIONAL LAW, 2, 3.  
51 Vict. ch. 29, secs. 3, 4, 6A. 173, 177, 306, 307 (D.) (Railway Act.)  
See RAILWAY, 1.  
55 Vict. ch. 99 (O.) (Toronto Railway Company.)  
See STREET RAILWAY.  
R.S.O. 1897, ch. 128, secs. 22, 23 (Wills Act.)  
See WILL, 1.  
63 & 64 Vict. ch. 23, sec. 1 (D.) (Amending Railway Act.)  
See RAILWAY, 1.  
R.S.C. 1906, ch. 1, sec. 28 (Interpretation Act.)  
See CRIMINAL LAW, 1.  
R.S.C. 1906, ch. 37 (Railway Act.)  
See RAILWAY, 2, 3.  
R.S.C. 1906 ch. 37, secs. 199, 204.  
See RAILWAY, 4.  
R.S.C. 1906, ch. 37, sec. 241.  
See RAILWAY, 5.  
R.S.C. 1906, ch. 77, sec. 19 (Naturalisation Act.)  
See ALIEN ENEMY, 3.

- R.S.C. 1906, ch. 115 (Navigable Waters' Protection Act.)  
*See* WATER, 2.
- R.S.C. 1906, ch. 139, secs. 69, 71 (Supreme Court Act.)  
*See* APPEAL, 4.
- R.S.C. 1906, ch. 144, sec. 11 (*d*), (*e*) (Winding-up Act.)  
*See* COMPANY, 3.
- R.S.C. 1906, ch. 144, secs. 20, 23, 84.  
*See* COMPANY, 4.
- R.S.C. 1906, ch. 144, sec. 117.  
*See* BANKS AND BANKING, 2.
- R.S.C. 1906, ch. 144, sec. 123.  
*See* COMPANY, 2.
- R.S.C. 1906, ch. 145, secs. 41, 45 (Canada Evidence Act.)  
*See* DIVISION COURTS, 2.
- R.S.C. 1906, ch. 146, secs. 72, 74 (Criminal Code.)  
*See* CRIMINAL LAW, 8.
- R.S.C. 1906, ch. 146, secs. 169, 773 (*e*), 778.  
*See* CRIMINAL LAW, 5.
- R.S.C. 1906, ch. 146, secs. 212, 984.  
*See* CRIMINAL LAW, 3.
- R.S.C. 1906, ch. 146, secs. 221, 222, 223.  
*See* CRIMINAL LAW, 1.
- R.S.C. 1906, ch. 146, secs. 226, 228, 986.  
*See* CRIMINAL LAW, 4.
- R.S.C. 1906, ch. 146, secs. 722, 1081.  
*See* CRIMINAL LAW, 6.
- 6 Edw. VII. ch. 27 sec. 3 (3) (O.) (Prospectuses of Companies.)  
*See* COMPANY, 1.
- 7 Edw. VII. ch. 34 (O.) (Companies Act.)  
*See* COMPANY, 1.
- 1 Geo. V. ch. 6 (O.) (Bed of Navigable Waters Act.)  
*See* WATER, 3.
- 3 & 4 Geo. V. ch. 13, secs. 10, 29 (D.) (Amending Criminal Code.)  
*See* CRIMINAL LAW, 4.
- R.S.O. 914, ch. 1, sec. 28 (*i*) (Interpretation Act.)  
*See* WOODMEN'S LIENS.
- R.S.O. 1914, ch. 6, sec. 24 (Voters' Lists Act.)  
*See* MUNICIPAL CORPORATIONS, 7.
- R.S.O. 1914, ch. 32, sec. 164, rules 14, 15, 40, 98 (Mining Act.)  
*See* MINES AND MINERALS.
- R.S.O. 1914, ch. 54, secs. 2, 3 (Privy Council Appeals Act.)  
*See* APPEAL, 2, 3.
- R.S.O. 1914, ch. 56, secs. 16 (*b*), 32 (Judicature Act.)  
*See* CONSTITUTIONAL LAW, 1.
- R.S.O. 1914, ch. 56, sec. 16 (*f*).  
*See* ALIEN ENEMY, 2.
- R.S.O. 1914, ch. 56, sec. 24.  
*See* COSTS.
- R.S.O. 1914 ch. 56, sec. 32.  
*See* CONSTITUTIONAL LAW, 1 — MUNICIPAL CORPORATIONS, 9.
- R.S.O. 1914, ch. 59, sec. 22 (7) (County Courts Act.)  
*See* COSTS.
- R.S.O. 1914, ch. 59, sec. 40 (2).  
*See* PRACTICE.
- R.S.O. 1914, ch. 62, sec. 69 (5) (Surrogate Courts Act.)  
*See* EXECUTORS AND ADMINISTRATORS, 1.
- R.S.O. 1914 ch. 63, secs. 61 (*a*), 127, 128 (Divisional Courts Act.)  
*See* DIVISION COURTS, 1.
- R.S.O. 1914, ch. 63, sec. 72.  
*See* DIVISION COURTS, 2.
- R.S.O. 1914, ch. 71, sec. 12 (Libel and Slander Act.)  
*See* LIBEL.
- R.S.O. 1914, ch. 75, secs. 2 (*a*), 49 (Limitations Act.)  
*See* EXECUTION — EXECUTORS AND ADMINISTRATORS, 1.
- R.S.O. 1914, ch. 75, sec. 5.  
*See* LIMITATION OF ACTIONS.
- R.S.O. 1914, ch. 75, sec. 35.  
*See* WATER, 3.
- R.S.O. 1914, ch. 76, sec. 10 (Evidence Act.)  
*See* RAILWAY, 5.
- R.S.O. 1914, ch. 83, sec. 3 (1) (Fraudulent Debtors Arrest Act.)  
*See* ARREST.
- R.S.O. 1914, ch. 102 (Statute of Frauds.)  
*See* CONTRACT, 2, 3—LANDLORD AND TENANT, 1—SALE OF GOODS, 1—STATUTE OF FRAUDS.
- R.S.O. 1914 ch. 121 (Trustee Act.)  
*See* CHURCH.
- R.S.O. 1914, ch. 121, sec. 38 (2) (Trustee Act.)  
*See* EXECUTORS AND ADMINISTRATORS, 2.
- R.S.O. 1914, ch. 130, sec. 3 (Rivers and Streams Act.)  
*See* WATER, 1.
- R.S.O. 1914, ch. 130, sec. 4.  
*See* WATER, 4.
- R.S.O. 1914, ch. 136, sec. 9 (Conditional Sales Act.)  
*See* MECHANICS' LIENS, 3.
- R.S.O. 1914, ch. 140, sec. 2 (*c*) (Mechanics and Wage-Earners Lien Act.)  
*See* MECHANICS' LIENS, 5.

- R.S.O. 1914, ch. 140, secs. 2 (c), 6, 8.  
*See MECHANICS' LIENS, 6.*
- R.S.O. 1914, ch. 140, secs. 6, 10.  
*See MECHANICS' LIENS, 2.*
- R.S.O. 1914, ch. 140, secs. 6, 22.  
*See MECHANICS' LIENS, 1, 4.*
- R.S.O. 1914, ch. 140, sec. 16 (2).  
*See MECHANICS' LIENS, 3.*
- R.S.O. 1914, ch. 141, secs. 11, 33  
 (Woodman's Lien for Wages Act.)  
*See WOODMEN'S LIENS.*
- R.S.O. 1914, ch. 148, sec. 36 (Marriage Act.)  
*See CONSTITUTIONAL LAW, 1.*
- R.S.O. 1914, ch. 178, sec. 126 (Companies Act.)  
*See COMPANY, 3.*
- R.S.O. 1914, ch. 151 (Fatal Accidents Act.)  
*See ALIEN ENEMY, 1, 2.*
- R.S.O. 1914, ch. 183, secs. 170, 171 (9), 178 (1), (7) (Insurance Act.)  
*See INSURANCE, 2.*
- R.S.O. 1914, ch. 185, secs. 163, 169 (i) (Ontario Railway Act.)  
*See CRIMINAL LAW, 1.*
- R.S.O. 1914, ch. 186, secs. 39 (1), 47, 48 (Ontario Railway and Municipal Board Act.)  
*See MUNICIPAL CORPORATIONS, 1.*
- R.S.O. 1914, ch. 186, sec. 48 (6).  
*See APPEAL, 2, 3.*
- R.S.O. 1914, ch. 192, secs. 17, 20, 230 (Municipal Act.)  
*See MUNICIPAL CORPORATIONS, 1.*
- R.S.O. 1914, ch. 192, secs. 150, 266.  
*See MUNICIPAL CORPORATIONS, 7.*
- R.S.O. 1914, ch. 192, secs. 249, 250, 254.  
*See MUNICIPAL CORPORATIONS, 2.*
- R.S.O. 1914, ch. 192, sec. 286.  
*See MUNICIPAL CORPORATIONS, 8.*
- R.S.O. 1914, ch. 192, secs. 322 (3), 320.  
*See WATER, 3.*
- R.S.O. 1914, ch. 192, secs. 344, 347.  
*See MUNICIPAL CORPORATIONS, 5.*
- R.S.O. 1914, ch. 192, sec. 416.  
*See MUNICIPAL CORPORATIONS, 6.*
- R.S.O. 1914, ch. 192, sec. 460.  
*See HIGHWAY.*
- R.S.O. 1914, ch. 192, sec. 460 (2).  
*See RAILWAY, 5.*
- R.S.O. 1914, ch. 195, sec. 5 (9) (Assessment Act.)  
*See ASSESSMENT AND TAXES, 2.*
- R.S.O. 1914, ch. 195, sec. 47 (3).  
*See ASSESSMENT AND TAXES, 3.*
- R.S.O. 1914, ch. 195, secs. 94, 178.  
*See COVENANT.*
- R.S.O. 1914, ch. 198, sec. 67 (Municipal Drainage Act.)  
*See MUNICIPAL CORPORATIONS, 4.*
- R.S.O. 1914, ch. 198, sec. 80.  
*See ARBITRATION AND AWARD.*
- R.S.O. 1914, ch. 203, sec. 17 (Public Parks Act.)  
*See MUNICIPAL CORPORATIONS, 5.*
- R.S.O. 1914, ch. 215, sec. 2 (i) (Liquor License Act.)  
*See LIQUOR LICENSE ACT.*
- R.S.O. 1914, ch. 215, sec. 137 (6).  
*See MUNICIPAL CORPORATIONS, 9.*
- R.S.O. 1914, ch. 215, sec. 139.  
*See MUNICIPAL CORPORATIONS, 7.*
- R.S.O. 1914, ch. 246 sec. 18 (Dog Tax and Sheep Protection Act.)  
*See MUNICIPAL CORPORATIONS, 3.*
- R.S.O. 1914, ch. 265 (Department of Education Act.)  
*See CONSTITUTIONAL LAW, 3.*
- R.S.O. 1914, ch. 270, secs. 18 (a), 78 (Separate Schools Act.)  
*See CONSTITUTIONAL LAW, 3.*
- R.S.O. 1914, ch. 286, secs. 7, 8, 16, 18 (Religious Institutions Act.)  
*See CHURCH.*
- 4 Geo. V. ch. 25, secs. 15, 69, 105-109, and schedule 1, class 36 (O.) (Workmen's Compensation Act.)  
*See MASTER AND SERVANT, 1.*
- 5 Geo. V. ch. 24, sec. 8 (O.) (Amending Workmen's Compensation Act.)  
*See MASTER AND SERVANT, 1.*
- 5 Geo. V. ch. 34, secs. 32, 33 (O.) (Amending Municipal Act.)  
*See MUNICIPAL CORPORATIONS, 6.*
- 5 Geo. V. ch. 45 (O.) (Ottawa Roman Catholic Separate Schools.)  
*See CONSTITUTIONAL LAW, 2, 3.*

## STAY OF PROCEEDINGS.

*See ALIEN ENEMY, 2.*

## STREAMS.

*See WATER.*

## STREET RAILWAY.

*Agreement with City Corporation—55 Vict. ch. 99 (O.)—Exclusive Right to Operate upon Streets—Exception—Restriction—Expiry of Franchise of another Railway—Right to Op-*

*erate upon Portion of Street Released—Order of Ontario Railway and Municipal Board — Submission of Plans to City Engineer.*—Upon the proper construction of the agreement made in 1891 between the Corporation of the City of Toronto and the Toronto Railway Company and validated by the Ontario statute 55 Vict. ch. 99, the grant to the company of the right to operate surface street railways in the city for the term of 30 years from the 1st September, 1891, is not subject to a permanent exception as regards the portion of Yonge street from the Ontario and Quebec Railway (now the Canadian Pacific Railway) tracks to the north city limits; the restriction effected by the franchise of the Metropolitan Street Railway Company being removed during the period of 30 years, the city corporation cannot withhold from the Toronto Railway Company the exclusive right to operate upon the portion of Yonge street referred to, in the same manner as upon the other streets of the city.—*City of Toronto v. Toronto R.W. Co.* (1905), 5 O.W. R. 130, 132 (affirmed in *Toronto R.W. Co. v. Toronto Corporation*, [1906] A.C. 117), followed.—An order of the Ontario Railway and Municipal Board declaring the right of the Toronto Railway Company to operate upon the portion of Yonge street referred to was affirmed; and it was *held*, that the proceedings before the Board were a suffi-

cient submitting of the plans to the City Engineer under clause 12 of the conditions of the agreement. *Re Toronto R.W. Co. and City of Toronto*, 456.

See APPEAL, 3—CRIMINAL LAW, 1—RAILWAY, 1.

### SUMMARY CONVICTION.

See CRIMINAL LAW, 5.

### SUPREME COURT OF CANADA.

See APPEAL, 4.

### SUPREME COURT OF ONTARIO.

See APPEAL — CONSTITUTIONAL LAW, 1—COSTS—MASTER AND SERVANT, 1.

### SURETY.

See GUARANTY—STATUTE OF FRAUDS.

### SURROGATE COURTS ACT.

See EXECUTORS AND ADMINISTRATORS, 1.

### SURVIVORSHIP.

See PARTNERSHIP, 1.

### SYNDICATE.

See PARTNERSHIP, 2 — RECEIVER, 1.

### TAX SALE.

See COVENANT.

### TAXES.

See ASSESSMENT AND TAXES.

### TENANT.

See LANDLORD AND TENANT.

### TENANTS IN COMMON.

See LIMITATION OF ACTIONS.

**TENDER.**

See CONTRACT, 2.

**TERRITORIAL JURISDICTION.**

See DIVISION COURTS, 2.

**TIMBER.**

See WATER, 1, 4.

**TIME.**

See APPEAL, 4—INSURANCE, 1  
—MECHANICS' LIENS, 2, 4 —  
MUNICIPAL CORPORATIONS, 1.

**TITLE TO LAND.**

See COVENANT — DIVISION  
COURTS, 1—VENDOR AND PUR-  
CHASER—WATER, 3—WILL, 1.

**TRADING COMPANY.**

See COMPANY, 4.

**TREASON.**

See CRIMINAL LAW, 2, 8.

**TRIAL.**

*Jury—Address of Counsel—  
Objectionable Language — Ob-  
jection not Taken at Trial —  
Waiver — Verdict — Motion  
for New Trial—Costs.]—Where*  
counsel for the plaintiff in ad-  
dressing the jury (in an action  
brought against a street railway  
company to recover damages for  
injuries sustained by a woman-  
passenger by reason of the com-  
pany's negligence) used lan-  
guage which the Court con-  
sidered inflammatory and ob-  
jectionable, but no objection was  
taken at the trial, the evidence  
was fully discussed by the same  
counsel, the trial Judge did not  
see fit to interfere, and the ver-  
dict (in favour of the plaintiff)

was not unsatisfactory, the  
Court refused the defendants'  
motion for a new trial, but, in  
order to shew disapprobation of  
the language employed, without  
costs.—*Sornberger v. Canadian  
Pacific R.W. Co.* (1897), 24 A.  
R. 263, referred to. *Dale v.  
Toronto R.W. Co.*, 104.

See CRIMINAL LAW—LIMITA-  
TION OF ACTIONS—LIS PENDENS  
—MINES AND MINERALS—PRA-  
CTICE.

**TRUSTEE ACT.**

See CHURCH — EXECUTORS  
AND ADMINISTRATORS, 2.

**TRUSTS AND TRUSTEES.**

*Conveyance of Land by Deed  
Absolute in Form but as Secur-  
ity for Debt—Status of Grantee  
— Trustee without Power of  
Sale—Sale by Trustee without  
Concurrence of Cestui que Trust  
—Position of Purchasers—Exe-  
cutory Contract of Sale—Right  
to Call for Conveyance—Super-  
ior Equity of Cestui que Trust  
—Right to Redeem — Payment  
of Debt—Repayment of Amount  
Paid by Purchasers — Account  
—Costs—Claim of Purchasers  
against Trustee — Damages —  
Loss of Profits.]—Land was con-  
veyed by the plaintiff's testa-  
trix to the defendant S. by a  
deed absolute in form, but in  
reality as security for a debt:—  
*Held*, in an action against S.  
and the purchasers, that S. held  
the land as trustee and had no  
power to sell it without the con-  
currence of his *cestui que trust*.  
—*Pearson v. Benson* (1860), 28*

Beav. 598, followed.—*Oland v. McNeil* (1902), 32 S.C.R. 23, distinguished.—S. sold the land in good faith, but at a great undervalue; the contract of sale was executory—the land had never been conveyed:—*Held*, that the purchasers were not *bonâ fide* purchasers for value from S. so as to preclude the plaintiff from asserting her right: upon payment of the balance of the purchase-money, they would have an equity to compel a conveyance of the property to them; but that equity was subject to the prior equity of the *cestui que trust*. Actual payment of the price is necessary to establish a purchase for value.—*Molony v. Kernan* (1842), 2 Dr. & War. 31, followed.—The plaintiff was *held* entitled to redeem upon payment of the amount due to S.; and the purchasers to be refunded the money paid by them to S.; an accounting was ordered; and special directions as to costs and set-off were given.—The purchasers made a third party claim against the trustee to recover the loss of profit by reason of the increase in the value of the land since they purchased, and upon the ground that he had covenanted to convey.—*Held*, that these damages were not recoverable.—*McNiven v. Pigott* (1914-5), 33 O.L.R. 78, 335, followed. HETHERINGTON v. SINCLAIR, 61.

See CHURCH—INSURANCE, 1  
—RECEIVER, 1, 2—WILL, 2, 3.

## ULTRA VIRES.

See CONSTITUTIONAL LAW.

## VEHICLE.

See MASTER AND SERVANT, 2.

## VENDOR AND PURCHASER.

*Agreement for Sale of Land*  
—*Option in Lease—Acceptance*  
—*Absence of Title in Vendor—Knowledge of Purchaser—Failure of Vendor to Repudiate Option—Damages—Expenses of Searching Title—Nominal Damages—Costs.*]—A married woman owned land; her husband executed a lease of it in favour of the plaintiff; the lease contained an option of purchase; the plaintiff knew, before the execution of the lease, that the wife owned the land; he accepted the option, and sued both husband and wife for specific performance or damages. The evidence did not shew satisfactorily how the option came to be in the lease; but the husband knew about it afterwards and did not repudiate it. The wife refused to recognise it, and as against her the action was dismissed:—*Held*, that the acceptance was the formal completion of a contract with the knowledge that it was completely nugatory so far as the property was concerned; and the plaintiff's utmost right was only to the damages which would naturally flow from a breach of such an agreement, in the contemplation of both parties to it.—There was no right to recover even the ordinary damages, the expense of

searching the title; but nominal damages were recoverable, because the husband left the option standing after he knew that it was in the lease, and neither repudiated its insertion nor attempted to withdraw it.—Review of the authorities.—*Ontario Asphalt Block Co. v. Montreuil* (1913), 29 O.L.R. 534, *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, and *Pounsett v. Fuller* (1856), 17 C.B. 660, specially referred to. — Judgment was given for the plaintiff against the husband for \$5 damages and \$25 costs of an action for nominal damages. *McCune v. Good*, 51.

See CONTRACT, 2—COVENANT—MORTGAGE — PARTNERSHIP, 2 — PRINCIPAL AND AGENT — TRUSTS AND TRUSTEES—WILL, 1.

### VERDICT.

See CRIMINAL LAW—TRIAL.

### VOTERS' LISTS.

See MUNICIPAL CORPORATIONS, 7.

### WAGES.

See EXECUTORS AND ADMINISTRATORS, 1—WOODMEN'S LIENS.

### WAIVER.

See EXECUTORS AND ADMINISTRATORS, 1—TRIAL.

### WAR.

See ALIEN ENEMY—CRIMINAL LAW, 2, 8.

### WARRANTY.

See SALE OF GOODS, 3.

### WATER.

1. *Floatable Stream — Improvements Made by Crown Timber Licensees—Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 3—Lawful Detention of Water—Rights of Persons Floating Logs on Lower Part of Stream — Claim for Damages for Deprivation of Water — "Freshet."*—The defendants, who had acquired timber rights from the Crown by the purchase of limits in an unsurveyed territory owned by the Crown, in which were found the western sources of the Thessalon river, a floatable stream, constructed a series of dams upon that river—essential for taking away the timber. The plaintiffs during the season 1914 were driving logs down it from a tributary of the river which joined it below the confluence of its two branches:—*Held*, that, as to the floatation of logs in the river, the plaintiffs and defendants had equal rights under the Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 3.—Origin and history of the legislation, and consideration of the meaning of the word "freshet."—*Caldwell v. McLaren* (1884), 9 App. Cas. 392, 406, referred to.—But as to the user of the water above where the defendants had made improvements, they had preferential rights as statutory licensees. The statutory license, implemented by the erection of works, gave them, by necessary implication, superior rights in regard to the use and

control of these improvements, as between them and the plaintiffs operating below. *Hunt v. Beck*, 609.

2. *Obstruction Placed on Waters of Navigable Lake by Lessee of Water Lots—Right of Riparian Owner to Access to Shore—Interference with—Prospective Use of Shore — Navigable Waters' Protection Act, R.S.C. 1906, ch. 115—Obstruction to Navigation — Common Law Nuisance—Statutory Authority—Order in Council—Non-compliance with Conditions — Special Interest under Fishery License — Interference with Public Right — Special Damage — Action—Appeal — Costs.*]

The plaintiffs, riparian owners on Lake Erie, and holders of a license to fish in front of their lot and adjoining lots, could not, it was held, maintain that there was in fact interference with their riparian right of access by a pier erected upon the water in front of the plaintiffs' lot (at some distance from the shore) by the defendants, who had a lease from the Ontario Government of the water lot opposite the plaintiffs' lot, and the lots adjoining it; and that the suggested future user of the plaintiffs' lot as a landing-place, when a dock should be erected by them, could not support, under present conditions, a claim for damages or an injunction by reason of the pier.—Although the Navigable Waters' Protection Act, R.S.C. 1906, ch.

115, was intended to give the Governor-General in Council statutory authority to permit the erection of what would otherwise be a common law nuisance in navigable waters (*In re Provincial Fisheries* (1896), 26 S.C.R. 444), and although an order in council authorising the erection of the pier complained of by the plaintiffs had been issued under the authority of that Act, the defendants had not complied with the conditions of the order, and the pier was, when this action was begun, a common law nuisance and an obstruction to navigation; the plaintiffs had, therefore, having regard to their special interest under their fishery license, a right to sue without joining the Attorney-General for the Dominion as a party; but the right they sought to enforce was a public right—a right of navigation—not a property right, but a right of way—and there was no evidence that the pier in fact interfered with the plaintiffs' fishing operations. *Baldwin v. Chaplin*, 1.

3. *Rideau River — Navigable or Unnavigable Stream—Riparian Rights — Access to Stream as Highway in Winter—Possession of Municipal Corporation—"Reclaimed" Land — Title by Possession — Limitations Act, R.S.O. 1914, ch. 75, sec. 35—Bed of Navigable Waters Act, 1 Geo. V. ch. 6 (O.)—Effect as to Riparian Rights — Restoration — Acquiescence — Damages —*



*Right of Action—Accretion—Exercise of Rights—Opening of Highway—Municipal By-law—Acknowledgment—Compensation—Municipal Act, R.S.O. 1914, ch. 192, secs. 322 (3), 326—Right of Access from Private Land to Highway—“Right in the Nature of an Easement”—Costs.*]—An action brought by the plaintiffs to obtain a declaration of their rights, riparian or otherwise, as owners of lands in the city of Ottawa which originally bordered upon the Rideau river, but had been severed by land reclaimed by dumping and filling-in by the city corporation, and for possession and other relief, was dismissed without costs, upon many grounds of fact and law, and viewing the river either as navigable or unnavigable. *Twin City Ice Co. v. City of Ottawa*, 358.

4. *Rights of Lumbermen Floating Logs in River—Injury to Dam—“Unnecessary Damage”—Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 4—Negligence—Ordinary Course of Business.*]—By the Rivers and Streams Act, R.S.O. 1914, ch. 130, there is conferred upon lumbermen the right to use streams for floatation of timber with immunity from damage for injuries done to the property of others unless it can be found affirmatively that the operations were conducted negligently and with reckless disregard of the rights of others. “Unnecessary damage,” in sec.

4 of the Act, means damage which could be avoided by the exercise of reasonable care and caution.—In this case, it was held, that there had not been such disregard of the plaintiffs’ rights as to constitute “unnecessary damage.” — *Thompson v. Hill* (1870), L.R. 5 C.P. 564, applied.—*Semble*, that damage cannot be said to be unnecessary when it is occasioned by what is done in the ordinary course of the business contemplated by the statute. *Lowery and Goring v. Booth*, 204.

See ASSESSMENT AND TAXES, 3.

#### WAY.

See HIGHWAY—RAILWAY, 5.

#### WILL.

1. *Attempted Revocation—Invalidity—Wills Act, R.S.O. 1897, ch. 128, secs. 22, 23—Title to Land.*]—A testator, some years after the execution of his will, whereby he devised and bequeathed all his property to his wife, ran his pen through the various letters of his name signed at the end of the will—leaving the name still plainly legible—and wrote below, “I hereby revoke this will,” with the date and his initials. Below this he wrote, “witness to revoke,” and his wife, who was present while he did these things, signed her name below these words:—*Held*, that the will was not effectually revoked: the acts of the testator did not meet the requirements of secs.

22 and 23 of the Wills Act, R. S.O. 1897, ch. 128, which was the Act in force at the time of his death; that the will was properly admitted to probate; and that the title to the land in question passed thereunder.—*Re John Drury's Will* (1882), 22 N.B.R. 318, *In the Goods of Morton* (1887), 12 P.D. 141, and *In the Goods of Godfrey* (1893), 69 L. T.R. 22, applied and followed. *Re Mulholland and Van den Berg*, 242.

2. *Construction — Incomplete Devise — Implication — Gift over in one Event — Trust — Death of Trustee in Lifetime of Testatrix — Residuary Gift — Death of one Beneficiary—Intestacy as to her Part—Validity of Gift to Remaining Beneficiaries—Costs.*]—*Held*, construing a will, that H., the grandson of the testatrix, not having died under the age of twenty-six, took the property as devisee by implication from the terms of the will, and was absolutely entitled to it.—*Cropton v. Davies* (1869), L.R. 4 C.P. 159, and *Wilks v. Williams* (1861), 2 J. & H. 125, 128, applied and followed.—*Semble*, that the provision that in case H. should die before attaining the age of twenty-six the trustee should dispose of the lot “as she is hereinafter directed to dispose of the residue of my estate,” was a gift over of the beneficial interest in the lot to the persons who were to share in the distribution of the residuary estate.—

*Held*, also, that the gift to M. of the residue in trust did not lapse by reason of the death of M. in the lifetime of the testatrix; and that the residue was divisible equally between the grandchildren of the testatrix who survived her and M., and that there was an intestacy as to the latter's share.—Costs were ordered to be paid out of the property devised to H. *Re Cotter*, 24.

3. *Construction — Trust — Beneficial Estate for Life Given to Trustees nominatim — General Power of Appointment over Corpus—Right of Donees of Power to Appoint to themselves —“Or otherwise.”*]—By clause 1 of his will, the testator devised and bequeathed all his estate to his two daughters (naming them) upon trust: (2) to pay debts etc.; (3) to pay for masses; (4) to pay legacies to grandchildren; (5) “to hold all my property in lots 8 and 9 . . . with all stock crops furniture . . . thereon for my said daughters” (naming the same two again) “for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they my said daughters in the meantime to have all the rents and profits therefrom:”—*Held*, that there was a gift of the beneficial interest in the property to the two daughters; no trust of the beneficial interest in the corpus of the property was created;

and the two daughters took beneficially for life, with a general power of appointment over the corpus—a power which they might exercise by appointing to themselves.—The words “or otherwise,” while they might refer to the time of making the disposition, also included the objects of the gift.—*Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381, distinguished. *Gibbs v. Rumsey* (1813), 2 V. & B. 294, considered and applied. *Meagher v. Meagher*, 33.

See DISCOVERY — EXECUTORS AND ADMINISTRATORS, 1.

#### WINDING-UP.

See BANKS AND BANKING, 2—COMPANY, 2, 3.

#### WOODMEN'S LIENS.

*Action to Enforce Claims of Several Persons — Woodman's Lien for Wages Act, R.S.O. 1914, ch. 141, secs. 11, 33—Jurisdiction of District Court — “Claim” — “Person” — Interpretation Act, R.S.O. 1914, ch. 1, sec. 28 (i).]*—The Woodman's Lien for Wages Act, R.S.O. 1914, ch. 141, allows the combination of two or more claims (sec. 33); and the word “claim” in sec. 11 refers to the whole amount claimed in the action. Several woodmen, whose individual claims amount each to less than \$200, but in the aggregate amount to more than \$200, may join in one action, in the District Court, to enforce their claims—they are not obliged to sue separately in the

Division Court. “Person,” in the first line of sec. 11, may mean “persons,” by force of sec. 28 (i) of the Interpretation Act, R.S.O. 1914, ch. 1. *McNulty v. Clark*, 434.

#### WORDS.

“Abandonment.”] — See MECHANICS' LIENS, 1.

“Action.”]—See EXECUTION.

“Assisting.”]—See CRIMINAL LAW, 18.

“Bankable Paper.”] — See PROMISSORY NOTE.

“Beer.”] — See LIQUOR LICENSE ACT.

“Branch Line or Railway.”] —See RAILWAY, 1.

“Claim.”]—See WOODMEN'S LIENS.

“Class of Persons.”] — See CONSTITUTIONAL LAW, 2.

“Did not Affect the Result.”] —See MUNICIPAL CORPORATIONS, 7.

“Freshet.”]—See WATER, 1.

“Have by Law.”]—See CONSTITUTIONAL LAW, 2.

“Hawker.” —See MUNICIPAL CORPORATIONS, 6.

“Indictable Offence.”] — See CRIMINAL LAW, 1.

“Just and Equitable.”]—See COMPANY, 3.

“Justly Owing.”] — See MECHANICS' LIENS, 2.

“Keeper.”] — See CRIMINAL LAW, 4.

“Liquor.”] — See LIQUOR LICENSE ACT.

“Or otherwise.”]—See WILL, 3.

“Orphan Asylum.”] — See ASSESSMENT AND TAXES, 2.

"*Owner.*" ]—See **MECHANICS' LIENS**, 5, 6.

"*Party Adverse in Interest.*" ]—See **DISCOVERY**.

"*Person.*" ]—See **WOODMEN'S LIENS**.

"*Public Nuisance.*" ] — See **CRIMINAL LAW**, 1.

"*Regulations.*" ] — See **CONSTITUTIONAL LAW**, 3—**SCHOOLS**.

"*Remanded for Trial till Called on.*" ]—See **CRIMINAL LAW**, 6.

"*Request.*" ] — See **MECHANICS' LIENS**, 5.

"*Right in the Nature of an Easement.*" ]—See **WATER**, 3.

"*Right or Privilege.*" ]—See **CONSTITUTIONAL LAW**, 2, 3.

"*Special Circumstances.*" ]—See **APPEAL**, 4.

"*Special Value — Special Adaptability.*" ]—See **RAILWAY**, 2.

"*Structure on Railway Lands.*" ] — See **ASSESSMENT AND TAXES**, 3.

"*Unnecessary Damage.*" ] — See **WATER**, 4.

"*Work for the General Advantage of Canada.*" ] — See **RAILWAY**, 1.

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#### **WORKMEN'S COMPENSATION ACT.**

See **MASTER AND SERVANT**, 1.

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#### **WRIT OF SUMMONS.**

See **PRACTICE**.











